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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 585

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

vs.

NATIONAL BROADCASTING COMPANY, INC. (KOA),
MATHESON RADIO COMPANY, INC., AND BERKS
BROADCASTING COMPANY, INTERVENORS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED DECEMBER 12, 1942
CERTIORARI GRANTED JANUARY 18, 1943

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INDEX

	Page
Proceedings in U. S. C. A., District of Columbia	1
Appendix to brief for appellant	1
Appellant's notice of appeal dated June 7, 1941	1
Notice of hearing (WHDH) dated September 2, 1939	11
NBC petition to intervene dated September 23, 1939	13
Order dated September 29, 1939, denying petition to intervene	13
Decision on petition of Orlando Broadcasting Company, Inc.	14
NBC motion to dismiss application dated September 29, 1939	20
NBC petition for review of order denying petition to intervene	21
Order dated October 10, 1939, denying petition for review	24
Order dated November 20, 1939, authorizing Commissioner Case as the presiding commissioner in Docket 5453 to determine preliminary matters	25
Notice of hearing (WHDH) dated December 2, 1939	25
Order dated December 5, 1939, dismissing NBC motion to dismiss	26
Order designating Mr. R. H. Hyde to preside at hearing	27

Appendix to brief for appellant—Continued. Page

Commission's proposed findings of fact and conclusions dated December 9, 1940 27
Dissenting proposed findings of fact and conclusions dated December 9, 1940 32
NBC petition to intervene dated December 16, 1940 46
Order dated January 7, 1941, denying petition to intervene 50
Order to be effective April 7, 1941, adopting as final, proposed findings and conclusions of December 5, 1940 50
NBC petition for rehearing, April 25, 1941 52
Decision and order on petition for rehearing, May 20, 1941 63
NBC petition to Commission for stay during appeal, dated May 21, 1941 85
Commission decision and order, denying petition for stay during appeal, dated June 12, 1941 86
Appendix to brief for intervenor, Matheson Radio Co., Inc 95
Intervenor's notice of intention to intervene 95
Statement of intervenor's interest 96
Application of WHDH for construction permit 97
Letter from T. J. Slowie to WHDH dated September 21, 1938 105
Letter from T. J. Slowie to WHDH dated November 22, 1938 106
Letter from Mabel Walker Willebrandt, attorney for WHDH, to Federal Communications Commission, dated Nov. 25, 1938 107
Letter from Mabel Walker Willebrandt, attorney for WHDH, to Federal Communications Commission, dated Dec. 4, 1938 108
Order of Federal Communications Commission dated October 10, 1939, Continuing Hearing on WHDH application 108
Motion to WHDH to vacate Commission order of October 10, 1939, indefinitely continuing hearing on its application 109
Commission's notice of designation of hearing date of WHDH application 112
Commission's notice of continuance of hearing to January 15, 1940 112
Commission's notice of continuance of hearing to January 29, 1940 113
WHDH Exhibit No. 7 showing additional hours of operation requested 114
WHDH Exhibit 20—Map showing contours of the land area which will be served by WHDH operating as proposed 115
WHDH Exhibit No. 22 showing additional population which will be serviced by WHDH operating as proposed 115-A
WHDH Exhibit No. 23 showing the sea area which will be served by WHDH operating as proposed 116
WHDH Exhibit No. 24 showing the present night interference to Station KOA 117
WHDH Exhibit No. 28 showing the KOA secondary service area, the interference to KOA from Station CMCM, Cuba, and the WHDH 0.025 MV/V 10% contour 118
WHDH's proposed findings of fact 119

Appendix to brief for intervenor, Matheson Radio Co., Inc.—Con. Page
Opposition of Matheson Radio Company, Inc., to petition to intervene of National Broadcasting Company 142
Colored map graphically illustrating impossibility of harming listeners by granting WHDH application 143
Order of Commission of April 22, 1941, denying KOA petition for stay but suspending decision on Commission's own motion pending the filing of petition for rehearing by National Broadcasting Company 146
Opposition of WHDH to petition for rehearing of National Broadcasting Company 147
Opposition of WHDH to petition of National Broadcasting Company for stay during appeal 167
Appendix to brief for intervenor, Berks Broadcasting Co 178
Notice of intention to intervene 178
Verified statement of intervener's interest 179
Acknowledgment of service 180
Minute entry of argument and submission 181
Minute entry of reargument and submission 182
Opinion, Rutledge, J 183
Separate opinion, Groner, C. J., and Vinson, J 206
Separate opinion, Stephens, J 207
Dissenting opinion, Miller, J 209
Dissenting opinion, Edgerton, J 211
Judgment 214
Designation of record 215
Clerk's certificate [omitted in printing] 217
Stipulation as to record on petition for writ of certiorari 218
Order allowing certiorari 220
Stipulation as to record on writ of certiorari 221

IN

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

NO. 7933.

NATIONAL BROADCASTING COMPANY, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

MATHESON RADIO COMPANY, INC.,
BERKS BROADCASTING CO.,
Intervenors.

Appeal from the Federal Communications Commission.

APPENDIX TO BRIEF FOR APPELLANT.

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS DESIGNATED BY APPELLANT.

2 *Notice of Appeal from Decision and Order of the Federal Communications Commission and Statement of Reasons Therefor.*

I. Notice of Appeal.

Now comes National Broadcasting Company, Inc. this 7 day of June, 1941 and says that it is aggrieved and that its interests are adversely affected by decision and order of

the Federal Communications Commission dated April 7, 1941 (reaffirmed on May 20, 1941 by denying appellant's Petition for Re-hearing) granting an application for a
3 radio station license filed by Matheson Radio Company, Inc. as hereinafter more fully appears.

Wherefore, appellant gives notice of its appeal therefrom to the United States Court of Appeals for the District of Columbia.

II. Statement of the Nature of the Proceedings.

1. Appellant is a corporation organized and existing under the laws of the State of Delaware with its principal office at 30 Rockefeller Plaza, New York, N. Y. Appellant is the licensee of radio station KOA which station has been in continuous operation at Denver, Colorado since December 15, 1924. For more than twelve years prior to the reallocation of stations on March 29, 1941 pursuant to the North American Regional Broadcasting Agreement, KOA has been authorized to operate unlimited time with power of 50 kw on the frequency 830 kc. Under orders of the Federal Communications Commission (hereinafter called the "Commission") effective March 29, 1941, and in conformity with the terms and provisions of the North American Regional Broadcasting Agreement said station is now assigned to the frequency 850 kc.

2. Matheson Radio Company, Inc. (hereinafter referred to as "applicant") is the licensee of radio station WHDH at Boston, Massachusetts. Said station is now also assigned to the frequency 850 kc and prior to the decision and order complained of, was licensed to operate with power of 1 kw until sunset at Denver.

3. Continuously between November 11, 1928 and April 7, 1941 the Rules and Regulations of the Federal Radio Commission and of the Federal Communications Commission provided that the frequency of 830 kc (850 kc) upon which KOA and WHDH were licensed to operate should be classed as a clear channel upon which only one

station would be permitted to operate at night. Throughout this period KOA, being classed as the dominant clear channel station, has been authorized and permitted to operate at all times without co-channel interference at night from any other station in the United States. Since 1928 KOA has been protected from co-channel interference from any Canadian station pursuant to agreements existing between the Governments of the United States and Canada. Since March 29, 1941, (except for the action herein complained of on April 7, 1941) KOA's service and service area within the United States have also been entitled to protection from all stations in Canada, Mexico and Cuba under the provisions of the North American Regional Broadcasting Agreement.

4. Since December 18, 1935, the Rules and Regulations of the Commission have contained the following provisions now found in Section 1.72 of said Rules and Regulations:

> "Any application which is not filed in accordance with the Commission's Regulations will be considered defective. * * * Such defective applications will not be considered by the Commission, but will be returned to the applicant by the Secretary, with a brief statement of the respect in which it is defective."

5. Since August 1, 1939, Section 1.71 of the Commission's Rules and Regulations has contained the following provisions:

> "Each application for an instrument of authorization shall comply with the Commission's Rules and Regulations and shall be made in writing, subscribed and verified as provided in Section 1.121 on a form furnished by or in the manner prescribed by the Commission: * * * *Provided, further,* that in cases where an applicant desires a modification of a Rule or Regulation he shall submit a formal Petition setting forth the desired change and the reasons in support thereof. The required forms may be obtained from the Commission or from any of its field offices. (For a list of such offices and related geographical districts see appendix No. 3)."

6. The application of Matheson Radio Company, Inc., granted by the Commission on April 7, 1941, requested the use of power of 5 kw with a directional antenna during unlimited hours of operation. Said application was filed October 25, 1938. Neither the application nor any other document submitted by the applicant with said application or relating thereto requested any modification of the Commission's Rules and Regulations.

7. On January 3, 1939, and notwithstanding the procedural requirements of the Commission's Rules and Regulations and the applicant's failure to meet the same, the Commission designated the WHDH application for hearing before Commissioner Case. Its Notice of Hearing dated September 2, 1939, specified the following issues:

1. To determine whether the interests of any other stations may be adversely affected by reason of interference, particularly stations KOA, WRUF, WEEU and WABC;
2. Because of the pendency of another application with which conflict may be had by reason of interference, *i. e.;* B3-P-2408 (WRUF);
3. *To determine whether public interest, convenience or necessity would be served by modifying the Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25; (Part III), to authorize the operation of WHDH as proposed;* (Italics supplied)
4. To determine whether station WHDH, operating as proposed on 830 kc with 5 kw power would render the type of service for which said frequency is designed under the Commission's plan of allocation and Standards of Good Engineering Practice.

8. On February 23, 1939, appellant filed a Petition to Intervene in any proceedings relating to the WHDH application. In said Petition it was alleged, among other things, that the operation of WHDH as proposed would cause in-

terference to KOA in areas where KOA's signal is
6 now interference free; that appellant would be aggrieved and its interests adversely affected should WHDH be authorized to operate as proposed; and that the operation of WHDH as proposed would not be in the public interest, convenience and necessity. This Petition was denied by Commissioner Payne on October 2, 1939 and, on October 10, 1939, a Petition to Review his action, filed under Section 1.256, was also denied by the Commission.

9. On September 29, 1939, appellant filed a Motion to Dismiss the WHDH application because said application was patently in conflict with Sections 3.22 and 3.25 of the Commission's Rules and Regulations and because of the failure of the applicant to conform to the requirements of Section 1.71 of the Commission's Rules and Regulations. The relief requested by appellant was that the hearing then scheduled upon said application be cancelled and that the application be dismissed and returned to the applicant. This Motion was denied by the Commission on December 5, 1939.

10. On December 2, 1939, the Commission, on its own motion, issued a second Notice of Hearing to replace the Notice originally issued on September 2, 1939, as aforesaid, which Notice specified the following issues:

1. *To determine whether or not the Commission's Rules and Regulations Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and applied preclude the granting of the application.* (Italics supplied)
2. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with stations KOA, WRUF, WEEU and WABC;
3. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with station WRUF operating as proposed in its pending application (File B3-P-2408).

11. On January 29, 1940, a hearing was held upon the second or substituted Notice of Hearing before an Examiner of the Commission which hearing was followed on December 9, 1940, by the issuance of the Commission's "Proposed Findings of Fact and Conclusions". In said "Proposed Findings of Fact and Conclusions" three of the five members of the Commission present and participating proposed that Section 3.25 of the Commission's Rules and Regulations be amended so as to alter the status of the frequency 830 kc to permit the nighttime operation of WHDH as proposed in the pending application and also recommended that said application be granted. Two Commissioners dissented in a separate opinion released on the same day.

12. On December 16, 1940, and after being advised of the contents of the Commission's "Proposed Findings of Fact and Conclusions", appellant filed a second Petition to Intervene in which, among other things, it requested that it be permitted to:

(a) File a motion to reopen the proceedings in order to afford appellant an opportunity to introduce evidence, cross examine all witnesses and otherwise participate fully in the proceedings.

(b) Upon such record file Proposed Findings of Fact and Conclusions of Law.

(c) Have the right to file exceptions to any proposed Commission Decision thereafter issued.

(d) Request Oral Argument upon such decision and upon exceptions thereto, and

(e) In all respects participate fully in the important issues involved in the application of Matheson Radio Company, Inc.

Said Petition was denied by order of the Commission dated January 7, 1941, at which time it was announced that appellant would be permitted to file a brief *amicus curiae*.

13. Thereafter on January 27, 1941, appellant filed

its Brief *amicus curiae* and, on February 20, 1941, oral argument was had before the Commission in which appellant was permitted to participate not as a party in interest but again as *amicus curiae*. On March 27, 1941, the Commission publicly announced that it had adopted the "Proposed Findings of Fact and Conclusions" made public on December 9, 1940, by a vote of three to two with two members not participating. On April 7, 1941, a formal Order to this effect was promulgated effective on the same day.

14. On April 25, 1941 and pursuant to the provisions of Section 405 of the Communications Act of 1934 appellant filed a Petition for Rehearing. On May 20, 1941 the Commission entered its Order denying appellant's Petition for Rehearing and reaffirming its decision and order of April 7, 1941.

III. Reasons Relied on by Appellant.

1. The Commission erred in failing to return the WHDH application to the applicant without action as a defective application under its Rules.
2. The Commission erred in denying the Petition to Intervene filed by appellant September 23, 1939.
3. The Commission erred in denying the Motion to Dismiss the WHDH application filed by appellant September 29, 1939.
4. The Commission erred in denying the Petition to Intervene filed by appellant December 16, 1940.
5. The Commission erred in denying the Petition for Rehearing filed by appellant April 25, 1941.
6. The Commission's Decision and Order of April 7, 1941 (reaffirmed May 20, 1941) is contrary to law for each of the following reasons:

9 (a) It results in a substantial modification of the license held by appellant authorizing it to operate radio station KOA without having afforded appellant an opportunity to be heard as required

by Section 312 (b) of the Communications Act of 1934.

(b) It results in a change in the class and character of the frequency of radio station KOA without the consent of the licensee of said station and without affording said licensee an opportunity to be heard as required by Section 303 (f) of the Communications Act of 1934.

(c) It results in a degradation of service on 830 kc (850 kc) which will be prejudicial to the priority rights of the United States on this channel under Paragraph B 8 (d) of Part II of the North American Regional Broadcasting Agreement without affording appellant an opportunity to be heard on its own behalf and on behalf of the listeners it serves.

(d) It results in a discrimination against service to rural listeners in order to furnish additional service to the residents of the City of Boston and as such is violative of the requirements of Section 307 (b) of the Communications Act of 1934.

(e) It effects a change in the policy of the Commission with respect to the use of the frequency 830 kc (850 kc) and authorizes and directs a new kind of use of said frequency after a hearing before an examiner contrary to Section 409 (a) of the Communications Act of 1934.

(f) The Commission was without power to grant the WHDH application except after a hearing upon issues clearly defined and after affording appellant an opportunity to participate fully in such hearing.

(g) The Commission was without power to take any action upon the WHDH application except to return said application to the applicant as required by its Rules and Regulations.

(h) The Commission was without power under its Notice of Hearing dated December 2, 1939, either to amend its Rules and Regulations fixing the

status of the frequency 830 kc (850 kc) or to grant the WHDH application which was clearly in conflict with said Rules and Regulations.

(i) The Commission was without power to grant the WHDH application except after a full hearing in which the burden of proof was upon the applicant to show that the granting of its application would make for a fair, efficient and equitable distribution of radio service and would in all aspects serve the public interest, convenience and necessity.

7. The Decision and Order complained of is erroneous, arbitrary and capricious, in that it constitutes an attempt by the Commission while acting in its quasi-judicial capacity to ignore and retroactively to repeal its own pronouncements promulgated while acting in its legislative capacity.

8. The Decision and Order complained of is arbitrary and capricious in that, despite applicant's express disavowal of such a purpose, it is predicated upon a proposal for a new kind of use of the frequency 830 kc (850 kc) concerning which appellant had no due and timely notice and upon which it was not heard prior to the issuance of said final Decision and Order.

11 9. The Decision and Order complained of is arbitrary and capricious in that it is predicated upon a proposal for the use of the frequency 830 kc (850 kc) advanced by the Commission subsequent to the issuance of its second Notice of Hearing which Notice clearly indicated that such a proposal would not be considered.

10. The Decision and Order complained of was made without affording appellant the type and character of hearing required by the Communications Act of 1934.

11. The Findings and Conclusions of the Commission are insufficient to support the Decision rendered and do not fairly report and represent the evidence in the record.

12. The evidence is insufficient to support the Commission's Decision and Order in that it affords no basis for a comparison of the services rendered by radio stations WHDH and KOA.
13. The evidence is insufficient to support the Commission's Decision and Order in that it fails to afford any basis for a determination of the relative scope, character and quality of the radio services available to the residents of Boston and the area adversely affected by the granting of the WHDH application.
14. The Decision and Order complained of is illegal, void and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States in that it is based upon facts and issues concerning which appellant was denied a hearing at any stage of the proceedings.

12 *IV. Review Requested.*

WHEREFORE the appellant prays an order reversing said decision and order of the Federal Communications Commission and for such further relief as to this Honorable Court may seem just and proper.

Respectfully submitted,

NATIONAL BROADCASTING COMPANY, INC.,
By D. M. PATRICK,
PHILIP J. HENNESSEY, JR.,
Its Attorneys,
810 Colorado Bldg.,
Washington, D. C.

A. L. ASHBY,
HENRY LADNER,
Of Counsel.

Acknowledgment of Service.

Service of the foregoing "Notice of Appeal From Decision and order of the Federal Communications Commission and Statement of Reasons therefor" and receipt of a full, true and correct copy is hereby acknowledged this 7 day of June, 1941.

FEDERAL COMMUNICATION COMMISSION,
By T. J. SLOWIE,

68 Endorsed: Docket File Copy Original

Federal Communications Commission

Washington, D. C.

File No. B1-P-2201
Docket No. 5453

Notice

In re Application of Matheson Radio Company Inc. (WHDH)

Dated July 27, 1939
For Construction Permit
Class of Service Broadcast
Class of Station Broadcast
Location Saugas, Mass.; Trans. Boston, Mass.; Studio

Operating Assignment Specified Frequency 830 kc directional antenna night Power 5 kw night; 5 kw day Hours of operation Unlimited

The foregoing application has been designated for hearing at the office of the Commission, Washington D. C. on the 10th day of October, 1939.

1. To determine whether the interests of any other stations may be adversely affected by reason of interference, particularly Stations KOA, WRUF, WEEU and WABC;

2. Because of the pendency of another application with

which conflict may be had by reason of interference, i. e. (B3-P-2408) WRUF;

3. To determine whether public interest, convenience or necessity would be served by modifying the Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part 3), to authorize the operation of WHDH as proposed;

4. To determine whether Station WHDH, operating as proposed on 830 kc with 5 kw power would render the type of service for which said frequency is designated under the Commission's plan of allocation and Standards of Good Engineering Practice.

The application involved herein will not be granted by the Commission unless the issues listed above are determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing.

69 The applicant is hereby given the opportunity to obtain a hearing on such issues by filing a written appearance in accordance with the provisions of Section 1.382(b) of the Commission's Rules of Practice and Procedure. Persons other than the applicant who desire to be heard must file a petition to intervene in accordance with the provisions of Section 1.102 of the Commission's Rules of Practice and Procedure.

The applicant's address is as follows:

Matheson Radio Co. Inc.
Radio Station WHDH,
Hotel Touraine, 62 Boylston St.,
Boston, Mass.

Dated at Washington, D. C. September 2, 1939.

By the Commission

T. J. SLOWIE,
Secretary.

88 *Petition to Intervene*

National Broadcasting Company, Inc., files this Petition to Intervene in the above entitled matter. In support thereof it asserts:

1. Petitioner operates station KOA at Denver, Colorado on 830 kc with power of 50 kw unlimited time.

2. The operation of station WHDH at Boston, Mass., as proposed will cause interference to station KOA in areas where KOA's signal is now interference free.

3. Petitioner would be aggrieved and its interests adversely affected should WHDH be authorized to operate as proposed.

4. The operation of WHDH as proposed would not be in the public interest, convenience and necessity.

Respectfully submitted,
NATIONAL BROADCASTING COMPANY, INC.

A. L. ASHBY
PHILIP J. HENNESSEY, JR.
HENRY LADNER
JOHN J. HURLEY
Its Attorneys
201 Normandy Building
Washington, D. C.
By PHILIP J. HENNESSEY, JR.

Dated this 23rd day of September 1939.

* * * * * * * * * * *

102 *Order*

Upon consideration of a Petition to intervene filed herein on September 23, 1939, by National Broadcasting Company, Inc.,

It is ordered, on this the 29th day of September, 1939, that the Petition be, and the same is, hereby, denied.

See decision entered this day in Docket No. 5698 on

Petition of Orlando Broadcasting Company, Inc.
By order of George Henry Payne, Commissioner.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,

Secretary.

103 *Decision on Petition to Intervene and Request for Enlargement of the Issues.*

Payne, Commissioner (Presiding at Motions Docket)

This petition was filed by the Orlando Broadcasting Company, Inc., licensee of Radio Station WDBO, Orlando, Florida, and requests leave to intervene in the hearing designated by the Commission on the above-entitled application and further requests that the issues heretofore designated by the Commission to be heard at said hearing be enlarged to include the following: (a) to determine the extent of the broadcast service already rendered in the Orlando area; (b) to determine if the interests of Station WDBO will be adversely affected by a grant of the above-entitled application; and (c) to determine whether the operations of the station proposed by the applicant will be in accord with the Commission's plan of allocation and standards of good engineering practice.

Petitioner requests that it be made a party in the proceedings on the application of Hazelwood, Inc. and that it be allowed to present evidence on the issues listed in the Notice of Hearing heretofore published by the Commission as well as upon the additional issues requested to be added and any further issues which may be added hereafter.

When the application of Hazelwood, Inc. was received by the Commission it was examined as required by Section 309(a) of the Act, and because the Commission was unable upon such examination to reach the decision that the public interest, convenience and necessity would be served by a grant of the application it was designated for hearing in order to afford the applicant an opportunity to be heard

on the question of whether or not the application should be granted. The only issue specified by the Commission in the Notice of Hearing was that relating to the possibility of adverse effect upon the service rendered by Stations KLRA, WHK and WMFJ by reason of electrical interference which might result from the operation of the proposed new station.

104* The instant petition to intervene and to enlarge the issues to include questions other than those specified in the Notice of Hearing requires an interpretation of the Commission's rule 1.102 which became effective on August 1, 1939. Because the questions raised by the instant petition are also involved in a number of other petitions now pending on the motions docket, I feel that it is appropriate to express in some detail my views concerning the sufficiency of the instant petition in the light of the Commission's present rule governing intervention and enlargement of issues.

The Commission's rule relating to intervention and enlargement of issues, reads as follows:

"Sec. 1.102 Intervention. Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest and must be subscribed or verified in accordance with Sec. 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same."

In applying this rule to the instant petition I will deal with the request to intervene, and the request to enlarge issues separately.

Petitioner's Request to Intervene

The underlying purpose of the Commission in adopting its present rule on intervention was to correct a practice which had become prevalent under the prior rule of the Commission relating to intervention. Under its former rule, the Commission permitted any person to intervene in a hearing if his petition disclosed "a substantial interest in the subject matter." This standard was so broad and the Commission's practice under it was so loose that intervention in Commission hearings came to be almost a matter lying in the exclusive discretion of persons seeking to become parties to Commission proceedings. The experience of the Commission during the past few years clearly demonstrated that the participation of parties other than the applicant in broadcast proceedings in a great many cases resulted in unnecessarily long delays and expense to both the Commission and applicants without any compensating public benefit. In many cases the major function served by intervenors was to impede the progress of the hearing, increase the size of the record, confuse the issues and pile up costs to the applicant and to the Commission through the introduction of cumulative evidence, unnecessary cross-examination, dilatory motions, requests for oral argument and other devices designed to prevent expeditious disposal of Commission business.

105 The underlying purpose of the present rule is to limit participation in proceedings, particularly on broadcast applications, to those persons whose participation will be of assistance to the Commission in carrying out its statutory functions. The present rule requires a petitioner to set forth not only his interest in the proceeding but also "the facts on which the petitioner bases his claim that his intervention will be in the public interest". The fact that a proposed intervener may have the right to contest in a court the validity of an order granting or denying a particular application does not in and of itself mean that such person is entitled as a matter of right to be made

a party to the proceedings before the Commission on such application. Intervention in proceedings before administrative agencies like the Federal Communications Commission is ordinarily covered by statutory provision. The Communications Act contains no provisions giving the right of intervention in proceedings before the Commission to any person or class of persons, but expressly provides that the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. By the adoption of Rule 1.102 the Commission in effect has declared that it will conduce to the proper dispatch of business and to the ends of justice if it permits intervention in a proceeding before it only if the making of a record in which the facts are fully and completely developed, is facilitated by permitting the requested intervention. It is this theory—that where the public will benefit through aid or assistance given to the Commission or the applicant by a party-intervenor in a broadcast hearing, such participation should be permitted—which underlies Rule 1.102.

The petition of the Orlando Broadcasting Company, Inc., utterly fails to meet the requirement of the present rule on intervention. In so far as it requests permission to participate in the hearing already designated on the application of Hazelwood, Inc., it simply prays that the petitioner be made a party and be allowed to present "evidence". Not the slightest intimation is given as to the type of evidence which the petitioner desires to adduce or what petitioner intends to prove by the introduction of such evidence. The only issue mentioned in the Commission's Notice of Hearing is the issue of electrical interference to Stations KLRA, WHK and WMFJ, which are now operating either on 1390 kc (the frequency requested by Hazelwood, Inc.) or on adjacent frequency. The petitioner operates its station on 580 kc, so there could be no electrical interference to petitioner's station, and while it would not be impossible for the petitioner to obtain data on the issue

specified in the Commission's Notice of Hearing, it is not likely that the petitioner is as well informed or is as well-equipped to adduce testimony concerning the issue of electrical interference as is the Commission itself. Without a proper showing of the type of evidence proposed to be adduced and the facts expected to be proved thereby, the Commission would not be justified in permitting the petitioner to intervene in the proceedings on the application of the Hazelwood, Incorporated.

106 On the basis of the allegations now set forth in the instant petition the request for intervention must be denied in so far as it requests permission to participate in the hearing on the issue already designated. In so far as the petition requests permission to adduce evidence pertaining to the issues which it requests the Commission to add to the Notice of Hearing, it is necessarily contingent upon the action which is taken on the request to enlarge issues. For reasons stated below, this request must also be denied. Hence, the request to intervene in order to adduce evidence relating to these issues must be denied not only for the reasons above stated but also because the request to enlarge issues is denied.

Petitioner's Request to Enlarge Issues

The determination of what issues an applicant for broadcast facilities should be required to meet in a hearing on his application is a matter committed by Congress to the discretion of the Commission. No hearing whatever is required if the Commission is able upon an examination of an application to determine that the public interest, convenience and necessity will be served by granting the application. If the Commission is not able to reach such a determination upon the examination of an application the statute requires that notice and an opportunity to be heard shall be given the applicant, but not otherwise.

Good administration, both from the theoretical and practical standpoint, requires that unduly long and expensive

hearings should be avoided. Therefore, the Commission should not burden itself or the applicant by the injection in a hearing of issues concerning which the Commission has already satisfied itself. Furthermore, if in a particular case it appears that a hearing on a particular issue would be expensive and time-consuming, while a hearing on another issue, which might finally dispose of the application, would be relatively inexpensive and expeditious, the Commission as a matter of administrative convenience should set down the application for hearing only on the latter issue.

In the instant case the Commission was unable to find that the public interest, convenience and necessity would be served by granting the application of Hazelwood, Inc., because of the possibility of interference with the service now rendered by three other stations. If at the hearing on its application the applicant is unable to sustain the burden with respect to this issue, the Commission will enter an order denying the application, which will completely dispose of the proceedings. In such event, it would have been wholly unnecessary and wasteful of both time and money for the Commission to have ordered a hearing not only upon the issue of electrical interference but also upon other issues which might also have constituted a basis for denying the application.

107 It is incumbent upon any person requesting the injection of new issues in a hearing to show not only that the issues which he proposes to have the Commission add are proper matters for the Commission to consider, and that there is a basis for believing that the Commission will be required to deny the application on the new grounds alleged, but also that the proposed new issues should be heard at the hearing already set rather than at a later time. Certainly, if the issues specified by the Commission in a Notice of Hearing are in themselves a sufficient basis for denying an application if the applicant fails to sustain its burden of proof, no third person is harmed because the Commission does not also include in the hearing other and

different issues, even though conceivably it may be necessary at some later time for the Commission to designate the application for further hearing if the applicant meets its burden on the issues already specified. The instant petition to enlarge issues merely states that the three issues requested for inclusion in the hearing are proper issues for the Commission to consider before acting upon the application of Hazelwood, Inc. Assuming for the purpose of this opinion but not conceding, that the three issues proposed to be included in the hearing are proper for the Commission to consider, petitioner has utterly failed to show that the insertion of these additional three issues in the hearing at this time on the application of Hazelwood, Inporated, would expedite the disposition of this application and not merely result in a more costly, drawn out and complicated record, with no attendant advantages to the Commission or to the public.

For the foregoing reasons, the petition to enlarge issues is denied.

By order of George Henry Payne, Commissioner.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

Dated September 29th, 1939.

* * * * * * * * * * *

124 *Motion to Dismiss Application*

National Broadcasting Company, Inc., an intervener in the above entitled matter moves to dismiss the above entitled application of Matheson Radio Company, Inc.

In support of its Motion this intervener avers:

1. The application upon its face requests unlimited hours of operation—see application upon FCC form 304 for Modification of Station License; application upon FCC form 301 attached thereto as exhibit A; see also Commission's Notice of Hearing.

2. At the time said application was filed it was, it is now, and at all intervening times has been, an application for

hours of operation for which station WHDH was and is ineligible under the Commission's Rules and Regulations; to-wit: Under Rule 116 prior to August 1, 1939 and under Paragraphs 3.22 and 3.25 (a) since August 1, 1939.

3. At the time said application was filed, at the present time, and at all times intervening, the Rules and Regulations of the Commission have provided that such applications will not be considered by the Commission but will be returned to the applicant by the Secretary with a brief statement of the respect in which such application is defective—to wit: Prior to January 1, 1939 under Rule 104.1; between January 1, 1939 and July 31, 1939 under section 4.02 of the Commission's Rules of Practice and Procedure; since August 1, 1939 under Paragraph 1.72 of the Commission's Rules of Practice and Procedure.

125 Wherefore, this intervener moves that the hearing now scheduled to be held upon the aforementioned application on October 10, 1939 be cancelled; and that the application be dismissed and returned to the applicant.

Respectfully submitted,

NATIONAL BROADCASTING COMPANY, INC.

A. L. ASHBY
PHILIP J. HENNESSEY, JR.
HENRY LADNER
JOHN HURLEY

By PHILIP J. HENNESSEY, JR.

Dated this 29th day of September 1939

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127 *Petition for Review Under Section 1.256*

On this Fourth day of October, 1939 National Broadcasting Company, Inc., (KOA,) files this Petition under Section 1.256 of the Rules and Regulations of the Federal Communications Commission for:

(a) A review and reversal by a quorum of the Commission of the Order of Commissioner George Henry Payne, bearing the date of September 29, 1939, denying a Petition to Intervene in the above-entitled matter filed on September 23, 1939 by National Broadcasting Company, Inc., and

(b) For other appropriate relief more fully described hereinafter.

Petitioner asserts that its action in filing this Petition is timely notwithstanding the lapse of more than two days between the date of September 29, 1939 which appears upon the face of the Order and the date upon which this Petition is filed for the following reasons:

1. On Friday, September 29, 1939, after hearing argument upon said Petition to Intervene, Commissioner Payne advised the undersigned Counsel for Petitioner that he would reserve decision upon the Petition until Monday, October 2, 1939.

2. On Monday, October 2, 1939 at about 1 P. M. the undersigned Counsel for Petitioner (who was then in Boston,
Massachusetts participating in the taking of depo-
128 sitions by the Applicant) was first advised by Counsel for the Applicant that the Petition to Intervene had been denied and Counsel forthwith returned to Washington, D. C.

3. A copy of the Order bearing the date of September 29, 1939 and bearing the seal of the Commission and the signature of its Secretary was first received at the offices of the Counsel for the Petitioner on October 4, 1939, at 9 A. M.

Specifications of Error

The Order complained of was not the subject of any decision or opinion. However, it refers to, and appears to be based upon, findings similar to those set forth in a decision also bearing the date of September 29, 1939 in Docket 5698 upon a Petition of Orlando Broadcasting Company, Inc. This Petitioner alleges that the Order complained of is erroneous as a matter of law in the following particulars:

1. If the Order is based upon findings that the Petition to Intervene filed on behalf of National Broadcasting Company, Inc. on September 23, 1939 is defective for failure to allege the position and interest of Petitioner in the proceeding and the facts upon which Petitioner bases its claim that its intervention would be in the public interest, then such findings are erroneous.

2. If the Order is based upon findings that Section 1.102 may properly require, and does require, allegations of fact over and above those set forth in the Petition of September 23, 1939, then such findings are erroneous and such additional requirements of Section 1.102 are void, contrary to law, beyond the authority of the Commission to adopt, and in violation of the Fifth Amendment to the Constitution of the United States.

129 3. Because of the failure of Commissioner Payne to find that Petitioner's Petition to Intervene contains all the necessary averments to support its intervention; his failure to find that Petitioner is entitled as a matter of right to participate fully in the proceedings in Docket 5453; and his failure to grant said Petition.

4. Because the Order complained of is unreasonable, arbitrary, and capricious.

Prayer for Relief

Petitioner prays:

1. That it be afforded an opportunity to present oral argument before a quorum of the Commission and briefs

2. That the Commission review and reverse the Order complained of

3. That an Order be entered permitting Petitioner to participate fully in the proceedings in Docket 5453.

4. That the hearing now scheduled to be held in Docket 5453 on October 10, 1939 be postponed until a date not less than 10 days after Commission Action upon this Petition.

Respectfully submitted,

A. L. ASHBY
PHILIP J. HENNESSEY, JR.
HENRY LADNER
JOHN J. HURLEY
Attorneys National Broadcasting Co., Inc., (KOA,)
201 Normandy Building
Washington, D. C.

By PHILIP J. HENNESSEY, JR.

Dated October 4th, 1939.

* * * * * * * * * * *

146 *Order*

Upon consideration on the merits of the Exceptions to Decision of Commissioner Payne, Presiding at Motions Docket, Petition for Review under Section 1.256 filed herein on October 4, 1939, by National Broadcasting Co., Inc., licensee of Station KOA, requesting review of the action by Commissioner Payne of September 29, 1939, denying Petition to Intervene therttofore filed by said station,

It is Ordered, That the action of Commissioner Payne Be Affirmed, That the Petition for Review Be Denied, That the exception of the petitioner to the action of Commissioner Payne Be Noted, and That the Opposition by the applicant to said Petition for Review Be Dismissed.

Dated October 10, 1939.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

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163 *Order*

At a regular meeting of the Commission held at its office in Washington, D. C., on the 20th day of November, 1939.

The Commission having under consideration the order heretofore entered, designating Commissioner Case to preside at the hearing in Docket No. 5453, and being fully advised in the premises:

It Is Ordered, that said Commissioner so designated to preside at the hearing in the above Docket Be, And He Is Hereby authorized and empowered to fix the time and place such hearing shall be held, to hear, consider, determine and act upon any and all petitions, motions, and other preliminary matters in connection wth, or pertaining to, said proceeding which may arise prior to the date of said hearing.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,
Secretary.

164 File No. B1-P-2201

Docket No. 5453

Notice

In Re Application Of Matheson Radio Company Inc.
(WHDH)
Dated July 27, 1938
For Construction Permit
Class of Service Broadcast
Class of Station Broadcast
Location Saugas, Mass.; Trans. Boston, Mass.; Studio
Operating Assignment Specified
Frequency 830 kc directional antenna night
Power 5 kw night; 5 kw day
Hours of operation Unlimited

The proposed issues on which the above-entitled application will be heard on December 11, 1939, at the offices of the Commission, Washington, D. C., are as follows:

1. To determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and applied preclude the granting of the application;

2. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with stations KOA, WRUF, WEEU and WABC;

3. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with Station WRUF operating as proposed in its pending application (File No. B3-P-2408).

Dated at Washington, D. C., December 2, 1939.

BY THE COMMISSION,
T. J. SLOWIE,
Secretary.

166 *Order*

The Commission, on November 20, 1939, having designated that Commissioner Case be authorized and empowered to hear, consider, determine and act upon any and all Petitions, Motions or other preliminary matters in connection with or pertaining to the above styled proceeding which may arise prior to date of said hearing; and

It appearing that the Commission, on December 2, 1939, amended the issues and reissued a notice of hearing in the above styled proceeding; and

It appearing that there are pending a Petition and Supplemental Petition to Intervene filed by the licensees of thirteen broadcast stations, Station KFI and others referred to therein as the "Clear Channel Group", the Motion to Dismiss the application or eliminate Issue No. 3 filed by such Group, the Motion to Dismiss application filed by the National Broadcasting Company, Inc. (KOA), and the op-

position to such Motions to Dismiss filed by the applicant, and being fully advised in the premises;

It Is Ordered that the Petition and Supplemental Petition to Intervene of the licensees of thirteen broadcast stations, Station KFI and others referred to therein as the "Clear Channel Group", the Motion to Dismiss the application or eliminate Issue No. 3 filed by such Group, the Motion to Dismiss application filed by the National Broadcasting Company, Inc. (Station KOA), and the opposition to such Motions to Dismiss filed by the applicant Be, And The Same Are Hereby dismissed without prejudice.

By Order of Norman S. Case, Commissioner, this the 5th day of December, 1939.

FEDERAL COMMUNICATIONS COMMISSION
JOHN B. REYNOLDS,
Acting Secretary.

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395 *Order*

It Is Ordered That Mr. R. H. Hyde, Be, And He Is Hereby, assigned as an examiner to preside at the hearing in the above entitled matter, scheduled for Monday, January 29, 1940.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,
Secretary.

• • • • • • • • • • •

517 *Findings of Fact*

1. These proceedings arose upon the application of Matheson Radio Company, Inc., licensee of Radiobroadcast Station WHDH, Boston, Massachusetts, for a permit to increase the power of Station WHDH from 1 kw to 5 kw and hours of operation from daytime and until sunset at Denver, Colorado, to unlimited time, with directional antenna at night. The application was designated for hearing by the Commission on January 3, 1939, and afterwards upon further consideration was scheduled for hearing pursuant to

a hearing notice dated September 2, 1939. On September 15, 1939, the petition of Berks Broadcasting Company (WEEU) to intervene in the hearing was granted. On September 29, 1939, a petition to intervene, filed by National Broadcasting Company as licensee of Station KOA, and a similar petition, filed by Columbia Broadcasting System, Inc., as licensee of Station WABC, were denied. On October 6, a petition of the Northern Corporation (WMEX) to intervene was denied. On October 10, 1939, the Commission denied a petition of National Broadcasting Company, Inc. (KOA), requesting review of the action of September 29, 1939, denying its petition to intervene. The hearing of the matter was continued indefinitely by the Commission by order dated October 12, 1939, but thereafter, on October 29, 1939, the case was again scheduled for hearing. An amended notice of hearing was issued December 2, 1939. On December 6, 1939, a petition and supplemental petition to intervene, filed by the licensees of 13 broadcast stations, referred to therein as the "c[illegible]r channel group", a motion to dismiss the application or eliminate certain issues of the hearing notice, filed by the same group of licensees, and a motion to dismiss the application filed by the National Broadcasting Company, Inc., as licensee of KOA, were dismissed. A hearing was held on the application January 29 and 30, 1940, before an officer designated by the Commission to conduct the proceedings. Proposed findings and motions to strike the intervention and the testimony of Berks Broadcasting Company (WEEU) were filed by applicant March 15, 1940. The intervener filed proposed findings March 15, 1940, and on March 28, 1940, filed an answer to applicant's motion to strike the intervention of Berks Broadcasting Company and the testimony adduced by the latter.

518 2. The amended notice of hearing upon the application, issued by the Commission December 2, 1939, contains the following statement of matters to be determined:

"1. To determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (part 3) properly interpreted and applied preclude the granting of the application;

2. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with stations KOA, WRUF, WEEU and WABC;

3. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with Station WRUF operating as proposed in its pending application (File No. B3-P-2408)."

3. Station WHDH, which is located at Boston, Massachusetts, is licensed to operate on the frequency 830 kc with 1 kw power with time of operation restricted to daytime and evening time preceding sunset at Denver, Colorado.

4. Station KOA, which is located at Denver, Colorado, is licensed to operate on the frequency 830 kc with 50 kw power and unlimited hours of operation.

5. The operating assignments of Stations WHDH and KOA, as provided in the licenses of these stations, comply with the following provisions of Sections 3.22 and 3.25 of the Commission's Rules:

"Sec. 3.22 Classes and power of standard broadcast stations.—(a) Class I station.—A 'class I station' is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in section 3.25 or in accordance with the 'Engineering Standards of Allocation.' The operating power shall be not less than 10 kilowatts nor more than 50 kilowatts."

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"Sec. 3.25 Clear channels; classes I and II.—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given; (a) To each of the channels below there will be assigned one class I station and there may be assigned
519 one or more class II stations operating limited time or daytime only: 640, 650, 660, 670, 700, 720, 740, 750, 760, 770, 800, 810, 820, 830, 850, 860, 870, 980, 990, 1000, 1070, 1090, 1130, 1150, 1170, and 1190 kilocycles. The power of the Class I stations on these channels shall not be less than 50 kilowatts."

6. The applicant requests that Station WHDH be authorized to operate unlimited hours on the frequency 830 kc, asserting that such operation would tend to accomplish maximum service to the public, and for that reason would not be inconsistent with the purposes for which Rules 3.22 and 3.25 were promulgated. But the Commission finds upon examination of the matter that the issuance of an authorization as applied for by applicant would not be in accordance with Section 3.25 of its Rules. Section 3.25 (a) of the Rules limits the use of the frequency 830 kc to one full-time station of 50 kw power; the applicant proposes to operate its station nighttime simultaneously with the station already assigned to the frequency.

7. In designating the instant application for hearing, however, the Commission specified certain issues, designed to provide for examination of evidence with respect to the nature, extent and effect of any interference which might be expected to result from operation of Station WHDH in the manner proposed by applicant. Upon consideration of the evidence material to these issues, it is concluded that operation of Station WHDH nighttime, with directional antenna, as proposed by applicant, would not cause any interference to the primary service of Station KOA, Denver Colorado, and that such interference as the proposed operation of WHDH might reasonably be expected to cause to reception of KOA would be limited to receivers in the

eastern half of the United States. Any use which might be made of the signal of KOA in the area where same might be affected by proposed operation of WHDH would be dependent upon the characteristics of the individual receiver, the signal intensity available, and signal to interference ratio involved in each individual case.

8. The operation of WHDH as proposed by applicant would not cause objectionable interference to Stations WRUF, WEEU or WABC.

9. The application of Station WRUF, File No. B3-P-2408, which was pending when this application was designated for hearing has been withdrawn.

10. The granting of a permit therefor and operation of Station WHDH as proposed by applicant will enable it to deliver service of primary signal quality to an area having a population of 3,093,000 or to 621,000 more people than are now included within the primary service area of the station. The hours of operation of applicant station will be extended two and one-half hours during summer months, and a maximum of five and one-half hours during winter months. This will provide a new primary service to 94.9% of the Boston metropolitan area, including a population of 2,185,000. In addition to the aforementioned improvements and extension of service to residents in the Boston area, there will be an improvement and extension of service which applicant station now endeavors to render over the fishing banks situated off the New England coast.

520 11. Upon examination and consideration of the evidence adduced with respect to the proposed use of the frequency 830 nighttime at Boston simultaneously with the present use of the frequency at Denver, the Commission finds that such operation would permit more efficient use of the frequency and has concluded to amend its rules by striking the reference to the frequency 830 kc from Subsection (a) of Section 3.25, and by adding the figure 830 immediately following the figure 790 in Subsection (b) of Section 3.25.

Conclusions

1. The operation of Station WHDH as proposed herein will not cause interference to the primary service of any station, and any interference which such operation may reasonably be expected to cause to Station KOA, Denver, will be limited to interference with intermittent reception upon receivers located in the eastern part of the United States, remote from the station.

2. The proposed change in the provisions of Rule 3.25 and the granting of the application of Matheson Radio Company, Inc. will permit of more efficient use of the frequency 830 kc, and serve public interest, convenience and necessity.

3. Applicant's motion to strike the intervention of Berks Broadcasting Company should be denied, the Commission being of the opinion that applicant has not presented any reason why the intervention should not have been allowed in the first instance or any reason why the intervener after becoming a party to the proceeding should not be permitted to continue as such until a final determination is made of the matter.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,
Secretary.

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521 Commissioners Norman S. Case and T. A. M. Craven Dissent from the Proposed Findings of Fact and Conclusions of the Commission, and Believe that the Proposed Findings of Fact and Conclusions of the Commission Should Have Read as Follows:

Findings of Fact

1. These proceedings arose upon the application of Matheson Radio Company, Inc., licensee of Radiobroadcast Station WHDH, Boston, Massachusetts, for a permit to increase the power of Station WHDH from 1 kw to 5 kw and hours of operation from daytime and until sunset at Den-

ver, Colorado to unlimited time, with directional antenna at night, on the frequency 830 kc. The application was designated for hearing by the Commission on January 3, 1939, and afterwards upon further consideration was scheduled for hearing pursuant to a hearing notice dated September 2, 1939. On September 15, 1939, the petition of Berks Broadcasting Company (WEEU) to intervene in the hearing was granted. On September 20, 1939, a petition of National Broadcasting Company to intervene as licensee of Station KOA, and a petition of Columbia Broadcasting System, Inc., to intervene as licensee of WABC, were denied. On October 6, a petition of the Northern Corporation (WMEX) to intervene was denied. On October 10, 1939, the Commission denied a petition of National Broadcasting Company, Inc. (KOA), requesting review of
522 the action of September 29, 1939, denying its petition to intervene. The hearing of the matter was continued indefinitely by the Commission by order dated October 12, 1939, but thereafter, on October 29, 1939, the case was again scheduled for hearing. An amended notice of hearing was issued December 2, 1939. On December 6, 1939, a petition and supplemental petition to intervene, filed by the licensees of 13 broadcast stations, referred to therein as the "clear channel group", a motion to dismiss the application or eliminate certain issues of the hearing notice, filed by the same group of licensees, and a motion to dismiss the application filed by the National Broadcasting Company, Inc., as licensee of KOA, were dismissed. A hearing was held on the application January 29 and 30, 1940, before an officer designated by the Commission to conduct the proceedings. Proposed findings and motions to strike the intervention and the testimony of Berks Broadcasting Company (WEEU) were filed by applicant March 15, 1940. The intervener filed proposed findings March 15, 1940, and on March 28, 1940, filed an answer to applicant's motion to strike the intervention of Berks Broadcasting Company and the testimony adduced by the latter.

2. The amended notice of hearing upon the application issued by the Commission December 2, 1939, contains the following statement of matters to be determined:

"1. To determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (part 3) properly interpreted and applied preclude the granting of the application;

2. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with stations KOA, WRUF, WEEU and WABC;

3. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with Station WRUF operating as proposed in its pending application (File No. B3-P-2408)."

3. Station WHDH, which is located at Boston, Massachusetts, is licensed for operation on the frequency 830 kc with 1 kw power daytime hours and until sunset at Denver, Colorado.

4. Station KOA is licensed to operate on the frequency 830 kc at Denver, Colorado, with 50 kw power and unlimited hours of operation, and is classified as a Class I station under the following provision of Sec. 3.22 of the Commission's Rules:

"Sec. 3.22—Classes and power of standard broadcast stations.—(a) Class I station.—A 'class I station' is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary
523 service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the 'Engineering Standards of Allocation'. The operating power

shall be not less than 10 kilowatts nor more than 50 kilowatts."

5. The frequency 830 kc, along with certain other frequencies, is allocated for use during nighttime hours by one 50 kw station (class I) by a regulation of the Commission, as follows:

"Sec. 3.25—Clear channels; classes I and II.—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given:

(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: 640, 650, 660, 670, 700, 720, 740, 750, 760, 770, 800, 810, 820, 830, 850, 860, 870, 980, 990, 1000, 1070, 1090, 1130, 1150, 1170, and 1190 kilocycles. The power of the Class I stations on these channels shall not be less than 50 kilowatts."

6. The applicant requests the Commission to authorize the operation of WHDH unlimited time on the frequency 830 kc simultaneously with the clear channel station now assigned to the frequency, notwithstanding the provisions of Sections 3.22 and 3.25 of the Commission's regulations. At the same time the applicant takes the position (in its appearance, in a statement during the course of the hearing and in its proposed findings) that it is not attacking the regulations or suggesting an amendment, change, or modification thereof; and asserts that it offers no argument that the regulations in their general application do not serve public interest, convenience, or necessity.

7. The application clearly is not consistent with the provisions of Sections 3.22 and 3.25 of the Commission's Regulations. No construction, interpretation or application of these regulations has been shown or suggested in the matters submitted by applicant, which would permit the granting of the authority requested without allowing an exception to the application of the regulations.

8. The Commission denied petitions from the licensee of Station KOA and others on the 830 kilocycle channel to participate in the hearing of the instant application. Likewise, the Commission denied the petition of a group of licensees operating stations in accord with Rule 3.25 (a), to participate in this hearing which involves a change of the aforesaid rule. Changing a basic rule of the Commission in a specific case while at the same time denying parties, who may be affected adversely by such change, the
524 right to participate in the hearing of the case is questionable legal procedure. Furthermore, such a procedure cannot safeguard the interest of the public when, as in this case, all evidence which may have a bearing on the important phases of this national problem of broadcasting cannot be available in the record of the hearing.

9. The applicant contends that operation of WHDH nighttime, simultaneously with KOA would not cause interference to the latter, but the testimony on this question is not in agreement. An expert in radio engineering, appearing as a consultant of applicant and as a witness in support of the application, testified that a usable service would not be provided beyond the calculated 500 microvolt signal intensity 50% of the time, field strength contour of Station KOA, and that no interference would be caused within the 500 microvolt 50% field intensity contour for the reason that it would not be reached by the 25 microvolt 10% of the time contour of WHDH, operating as proposed. The twenty to one or greater advantage in field strength ratio which KOA would have at its 500 microvolt 50% contour under the conditions proposed, is recognized as adequate to prevent objectionable interference. The applicant's projection of the WHDH 25 microvolt 10% contour extends from northern Minnesota to western New York and thence to Louisiana.

10. An expert from the Commission's staff testified that in the absence of unfavorable noise levels and interference to reception caused by signals of other stations, field intensities considerably below the value of 500 microvolts 50%

of the time provide usable service. The testimony of this witness also shows the fact that skywave field intensities such as those under consideration, are subject to wide variations in strength, from hour to hour, day to day, and week to week. It was calc lated that KOA would have a field strength of approximately 166 microvolts or greater 90% of the time at the same range where it would have a field of 500 microvolts 50% of the time. It was shown in this connection, that no sharp line of demarcation could be drawn between the areas where KOA would and would not deliver a usable signal.

11. There is also disagreement in the testimony with respect to the effect of operation of stations on adjacent channels upon the usability of the signal of KOA. It was shown that the effect of the signals from stations on adjacent channels would be determined in a large measure by the characteristics of the receiving equipment employed by the listeners.

12. The applicant showed that the signal of KOA is now subject to interference in certain areas from certain foreign stations, particularly CMHI, Santa Clara, Cuba, which operates on 830 kc with 5 kw power. This interference, however, will be eliminated when the changes in allocation contemplated by the North American Regional Broadcasting Agreement are completed. Under the provisions of the agreement KOA, if listed as a Class I station, will be entitled to protection against signals from foreign stations exceeding 25 microvolts (night) or 5 microvolts (day) at the boundary of the United States.

525 13. Upon consideration of all the evidence material to the issue, it is concluded that operation of WHDH as proposed herein would cause interference to the reception of service rendered by Station KOA in its extended secondary service area. The usefulness of this service is dependent upon the characteristics of the individual receiver, the signal intensity, available, and the signal to interference ratio involved in each individual case.

14. The operation of WHDH as proposed by applicant would not cause objectionable interference to Stations WRUF, WEEU or WABC.

15. The application of Station WRUF, File No. B3-P-2048, was withdrawn by applicant prior to the hearing of this matter.

Discussion

1. A conclusion to grant in full the instant application of WHDH can be reached only by applying the engineering standards specified for the clear channels of Rule 3.25 (b) to the clear channels of Rule 3.25 (a).

2. Therefore, it is important to review here the engineering standards which the Commission has recognized hitherto as being the best engineering practice. These make it possible for a clear channel station, operating under Rule 3.25 (a), to render primary service to a distance of from 50 to 100 miles, depending upon propagation conditions. While this primary service is constant under any specific condition, its technical quality varies in proportion to the amount of natural noise present in the background of the program as heard in the receiver of the listener. Usually, with any specified power the farther a listener is from a transmitter, the poorer the quality of received primary service. In addition to primary service, which is available both day and night, it is possible for a station operating in accord with Rule 3.25 (a) to render a secondary service at night. However, because of weaker signals and because of variation in the signal intensity from minute to minute, hour to hour, day to day, and year to year, all secondary service is inferior to primary service. The secondary service of a 50 kw clear channel station operating in accord with Rule 3.22 and 3.25 (a) may be grouped arbitrarily for purposes of this discussion into four grades of intermittent service, namely, (1) Good, beginning at about 100 miles and extending to approximately 400 miles from the transmitter; (2) Satisfactory, beginning at about 400 miles and extending to about 700 miles from the station; (3) Poor, beginning

at about 700 miles and extending to about 1000 miles from the station; and (4) Occasional, beginning at more than 1000 miles from the transmitter. The grade of service is dependent upon the amount of fading, and upon the strength of the received signal as compared to the loudness of natural noises also heard in the receiver. While it is possible to change the character of these grades of service at any specific point by raising or lowering the power at the transmitter, the maximum power now permitted by the Commission is 50 kilowatts.

526 3. The service from clear channel stations operating under Rule 3.25(b) is limited by the permissive introduction of radio interference. For this reason these stations are capable only of rendering secondary service to a much smaller area than are stations operating under Rule 3.25(a). In an attempt to provide means to control the amount of this interference to secondary service, the Commission accepted the advice of the radio engineers of the country. For stations operating under Rule 3.25(b) the Commission decided arbitrarily that interference to the secondary service rendered by such stations would be objectionable if it exceeds 25 microvolts more than 10% of the time when measured where the secondary service signal from the desired station has a value of 500 microvolts 50% of the time. This arbitrary method of evaluating and measuring the interference is necessary to secure some semblance of tangibility under conditions of unpredictable variation at any specific point. The standard applied here is not intended to indicate that clear channel stations operating under Rule 3.25(b) render an interference-free secondary service to the 500 microvolt contour and that thereafter the service is degraded. Much of the secondary service of a clear channel station operating under Rule 3.25(b) may be inferior in technical quality as compared to that of a clear channel station operating under Rule 3.25(a).

4. Many radio listeners in the nation must not only rely upon secondary service from clear channel stations for the

only broadcast service available to them but also millions of listeners now rely upon a low grade of secondary service in order to enjoy any broadcasting whatsoever. The most important problem confronting the Commission is to provide an improved radio service to these rural listeners. It appears that in any successful solution of this problem of rural broadcast coverage the Commission must rely primarily upon clear channel stations operating in accord with both Rule 3.25(a) and Rule 3.25(b).

5. Before adopting the engineering standards provided for in the existing Rules, the Commission in a public hearing considered the engineering opinion of the nation. The preponderant engineering opinion of the nation was that at least 25 clear channels of the type specified in Rule 3.25(a) were necessary to insure good nighttime broadcast service with a choice of only two programs to millions of persons residing in remote rural regions.

6. All the channels now provided in Rules 3.25(a) and 3.25(b) are barely sufficient to provide service for the rural areas of the country at night. Much of the rural areas receive no service in the daytime. Therefore, any reduction in the number of either of these classs of clear channels would handicap the Commission in providing the much needed improvement in rural coverage. This becomes obvious when it is assumed (1) that the listeners in rural areas are entitled to a choice of a minimum of four different programs, such as now provided to radio listeners in most of the metropolitan centers of the nation; (2) that the engineers of the country are correct in their assertion that each rural listener having available only secondary service must have signals available from at least two stations transmitting the same program in order to obtain a reasonable degree of continuity of service; and (3) that to secure the most ideal geographical distribution of clear channel stations from the standpoint of rural coverage, it would be necessary to disregard natural economic laws and establish such stations in places remote from markets and the centers of talent.

527 7. The technical quality of radio service in our cities is superior to that now rendered rural areas throughout the nation. Therefore, any course of action which handicaps the future ability of the Commission to equalize quality of service between cities and rural areas would be classed as discrimination against the rural population. A reduction of the number of clear channels may easily result in real discrimination against rural listeners in favor of the population living in metropolitan centers.

8. In the consideration of the important rural phase of the national radio broadcasting problem, the Commission must balance the effect of Paragraph B, 8(d) of Part II of the North American Regional Broadcasting Agreement, which reads as follows:

"(d) If within the period of this Agreement the country to which a clear channel has been assigned shall have made use of the channel but not in the manner above prescribed or not to the extent required by the provisions of this Agreement, such country shall be considered as having relinquished that portion of the rights which it has not used and at the expiration of this Agreement the other countries party thereto shall have the right, if they see fit, to withdraw the unused privileges from such country and to reassign them to any or all of the other interested countries."

9. This treaty provision should be interpreted in the light of international practice and international law. It means that if the United States should degrade the service on a particular class of radio channel on which it now has prior rights, the United States would lose its right to protection against the use of such channel in like manner by other nations. For example, if the United States now designates a station to operate in accordance with the Commission's Rule 3.25(a), other nations must not permit stations within their borders to operate in such a manner as to cause interference to the service of the United States'

station within the borders of the United States. On the other hand, if the United States should, by its own action, degrade the service rendered on one of its clear channels by licensing stations in accord with Rule 3.25(b) instead of Rule 3.25(a), other nations may, at a future date, take advantage of this situation and designate their stations to operate on the same channel in a manner which will cause interference within the borders of the United States. Therefore, if the United States should designate all of the channels now reserved under Rule 3.25(a) for the use of stations operating in accord with Rule 3.25(b), the United States would be severely handicapped in its future solution of its most important national radio technical problem.

10. The Commission has likewise recognized in its rules the necessity for coping with the practical situation inherent in the problem of distributing fairly to the vast number of communities of the nation the use of the relatively few radio broadcasting channels. This is accomplished by providing a large number of channels for regional and local stations.

528 11. Regional and local stations render no secondary service because several stations operate simultaneously on the same channel. This service is cut off by interference which the Commission must permit in order to solve the practical problem of distributing facilities to the various communities of the nation. Furthermore, at night the primary service of regional and local stations is considerably limited in area as compared to the area served by any class of clear channel station, thereby increasing the need in rural areas for clear channel service at night. Generally speaking, regional and local stations are ineffective as a means of solving the national problem of rural radio service at night.

12. In effect, the instant application of WHDH proposes to render an unlimited time regional station service primarily to the metropolitan district of Boston, which is already saturated with radio service from several other sta-

tions. In order to accomplish this, it is necessary to change Rule 3.25(a) so that WHDH may operate as a Class II station in the manner provided for this class in Rule 3.25(b).

13. A grant of full time operation to the licensee of WHDH might enable that licensee to survive with less effort under the strenuous competitive conditions which now confront him in Boston. Unfortunately, however, in considering this desire of the licensee of WHDH to improve his economic situation the Commission should not fail to consider likewise the paramount issues affecting the public of the nation as a whole.

14. A substantial improvement in the technical quality of service rendered by WHDH to the listeners of Boston can be obtained by granting the application in part, even though the Commission denies that part of the proposal which hinders the proper solution of the national problem. The issue thus may be narrowed to the question of whether rural listeners of the nation shall be handicapped in obtaining an improved broadcast service, or whether the people of the metropolitan district of Boston, already enjoying radio service from many stations, shall have an opportunity to listen on an average throughout the year for four hours a day longer to the service of WHDH. (The limits of the extension of time are 5½ hours per day in December and 2½ hours per day in July.)

15. In this issue it has not been demonstrated convincingly that the people of Boston will receive better radio service generally. However, if it be assumed that nothing need be done to improve broadcast service to the rural population of the nation, one may argue that the isolated case presented here by WHDH has merit. It can be stated in this argument that under present conditions at KOA, if WHDH is permitted to operate simultaneously at night with KOA on the channel, the only rural listeners who would be deprived of service from KOA reside in the occasional and poor secondary service areas, and those portions

of the satisfactory secondary service area from KOA within the States of North Dakota, Minnesota, Missouri, Arkansas, Oklahoma and Texas. Also it can be argued that listeners in these areas already receive secondary service from other stations and that the technical grade of service now received by them from KOA is not good secondary service and that therefore the operation of WHDH as proposed creates insufficient harm to override the advantages of improved service in Boston.

529 16. On the other hand, listeners in these western areas of the country do not receive either the quality or the variety of service now available to the citizens of Boston. Therefore, to degrade further the service of rural listeners dependent in whole or in part upon KOA and other clear channel stations is an injustice. Moreover, favorable Commission action in an isolated instance of this nature creates a precedent, the mere existence of which may handicap future ability to secure improved broadcast service to rural areas. Therefore, such favorable action in this case would constitute an action resulting ultimately in the establishment of an unsound policy for the nation as a whole. An unsound public policy of this nature obviously would not benefit the listening public. Furthermore, this deterioration of radio service is bound to result in repercussions against the entire radio industry.

17. In this instance, granting in full the application of WHDH would limit the future freedom of action of the Commission in two ways, to wit., (1) it would reduce the needed number of clear channels under Rule 3.25(a), and (2) it would ultimately accord rights to other nations which rights are not now conceded in the North American Regional Broadcast Agreement.

18. If proper weight is given to all of the factors discussed herein it must be concluded that the applicant WHDH has not proved that any advantage which may accrue to him or to the people of the metropolitan district of Boston outweighs the disadvantages of:

A. The application of unsound engineering in the solution of the rural broadcast problem of the nation.

B. The establishment of a precedent which may ultimately result in a discrimination against rural listeners in favor of those listeners living in metropolitan centers.

C. The establishment of a precedent which may result ultimately in handicaping the United States in providing for its people any desirable change in the organization of radio broadcast facilities designed to improve rural coverage.

19. If the Commission desires to degrade any or all of the few clear channels provided in Rule 3.25(a), it would be far better to do so in a manner which benefits some of the underserved rural population of the nation rather than to favor any metropolitan center already surfeited with radio service.

530 *Conclusions*

1. The provisions of the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part 3) properly interpreted and applied, preclude the granting in full the application.

2. Operation of Station WHDH as proposed herein would cause interference to reception of KOA in its extended secondary service area, but would not cause interference to Stations WRUF, WEEU or WABC.

3. The application of WRUF which was pending when the instant case was scheduled for hearing has been withdrawn.

4. That part of the application of WHDH which requests unlimited time of operation should be denied for the reason that it is not consistent with the provisions of Section 3.22 and 3.25 of the Commission's Rules Governing Standard Broadcast Stations.

5. That part of the application which requests an increase in power should be granted.

6. Applicant's motion to strike the intervention of Berks Broadcasting Company should be denied, the Commission

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being of the opinion that applicant has not presented any reason why the intervention should not have been allowed in the first instance or any reason why the intervener after becoming a party to the proceeding should not be permitted to continue as such until a final determination is made of the matter.

• • • • • • • • • • •

541 *Petition to Intervene*

National Broadcasting Company, Inc., petitions for leave to intervene in the above entitled matter. In support of its petition it avers:

1. Petitioner is, and for many years has been, the licensee and operator of station KOA at Denver, Colorado. Since 1928 Station KOA has been the dominant clear channel station assigned to the frequency of 830 kc which frequency has been continuously designated throughout this period as a clear channel upon which no second station would be permitted to cause interference at night.

2. The application of Matheson Radio Company, Inc. requests duplicate night operation for Station WHDH at Boston on 830 kc.

3. At the time said WHDH application was filed it was, it is now, and at all intervening times has been an application for hours of operation for which station WHDH was and is inelligible under the Commission's Rules; to-wit, under Rule 116 prior to August 1, 1939 and under Sections 3.22 and 3.25 (a) since August 1, 1939.

4. At the time said application was filed, at the present time, and at all times intervening the Rules of the Commission have provided that such applications will not be considered by the Commission but will be returned to the applicant by the Secretary with a brief statement of the respect in which such application is defective; to-wit, prior to January 1, 1939 under Rule 102.1; between January 1, 1939 and July 31, 1939 under Section 4.02 of the Commission's Rules of Practice and Procedure; since August 1,

1939 under Paragraph 1.72 of the Commission's Rules of Practice and Procedure.

5. Section 1.71 of the Commission's Rules of Practice and Procedure provides:

"That in cases where an applicant desires a modification of a rule or regulation he shall submit a formal petition setting forth the desired change and the reasons in support thereof."

In this proceeding applicant has never submitted
542 such a petition, nor has it, at any time, proposed a change in any of the Commission's Rules or Regulations. On the contrary, the applicant has repeatedly denied that it sought a change in any Commission Rule.

6. Notwithstanding that applicant had requested no change in the Commission's Rules, the Commission's first Notice of Hearing issued on September 2, 1939 set forth as one of the issues to be considered:

"3. To determine whether public interest, convenience or necessity would be served by modifying the rules governing standard broadcast stations, particularly Sections 3.22 and 3.25 (Part 3), to authorize the operation of WHDH as proposed."

On September 23, 1939 Petitioner herein filed a Petition to Intervene in the hearing schedules to be held upon the WHDH application on October 10, 1939. Said Petition to Intervene was denied by Order of Commissioner George Henry Payne on October 2, 1939. A Petition for Review of Commissioner Payne's action under Section 1.256 was denied by the Commission on October 10, 1939.

7. On September 29, 1939 Petitioner herein had also filed a Motion to Dismiss the WHDH application. No action was taken upon this Motion to Dismiss until December 5, 1939 at which time it was denied without prejudice by Commissioner Case. In the meantime, on December 2, 1939 the Commission had issued a second Notice of Hearing to replace the first Notice of Hearing dated September 2,

1939. The Paragraph numbered 3, which has been quoted above, did not appear in the second notice. In lieu thereof Paragraph 1 of the second notice read as follows:

"1. To determine whether or not the Commission's Rules governing standard broadcast stations, particularly Section 3.22 and 3.25 (Part III), properly interpreted and applied preclude the granting of the application."

Upon this notice and upon this issue a hearing was held on January 29, 1940.

8. On December 9, 1940 the Commission released its "Proposed Findings of Fact and Conclusions of the Commission (hereinafter designated 'majority findings')" in which it is proposed that Section 3.25 of the Commission's Rules be amended and that the application of WHDH be granted.

9. Petitioner avers that the majority findings herein, if adopted by the Commission, will:

543 (a) Result in interference to Station KOA in areas where KOA's signals are now interference free.

(b) Result in a modification of Petitioner's license to operate KOA both with respect to the Commission's Rules and Regulations, and with respect to the North American Regional Broadcast Agreement without having afforded Petitioner an opportunity to be heard contrary to Section 312(b) of the Communications Act of 1934.

(c) Result in a modification of the Commission's Regulations without having afforded Petitioner an opportunity to be heard contrary to Section 303(f) of the Communications Act.

(d) Result in a degradation of service on 830 kc which will be prejudicial to the priority rights in the United States on this channel, will discriminate against service to rural listeners in order to furnish additional service to the City of Boston which is already well served and will be violative of the requirement in Section 307(b) of the Communications Act of 1934 that

"The Commission shall make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same."

(e) Constitute a change of policy and a new kind of use of frequencies after a hearing before an examiner contrary to Section 409(a) of the Communications Act.

(f) Be contrary to the standard of public interest, convenience or necessity.

(g) Aggrieve and adversely affect the interests of Petitioner without affording Petitioner an opportunity to be heard.

Wherefore Petitioner respectfully requests that it be permitted to intervene in this proceeding in order that, as a party, it may:

1. Renew its Motion to Dismiss the WHDH application.

2. File a Motion to Reopen the proceeding in order to afford Petitioner an opportunity to introduce evidence to cross examine all witnesses and otherwise to participate fully in the proceedings.

3. Upon such record file proposed Findings of Fact and Conclusions of Law.

4. Have the right to file Exceptions to any proposed Commission decision thereafter issued.

5. Request Oral Argument upon such proposed decision and upon its Exceptions thereto.

544 6. In all respects participate fully in the important issues involved in the application of Matheson Radio Company, Inc.

Respectfully submitted,

NATIONAL BROADCASTING COMPANY, INC.

By PHILIP J. HENNESSEY, JR.,
201 Normandy Building,
Washington, D. C.
Its Attorney

566 *Order*

The Commission, having under consideration the petition filed by the National Broadcasting Company (KOA), to intervene in the hearing before the Commission on the above-entitled application and the opposition thereto filed by the applicant,

It is ordered, this 7th day of January, 1941 that the petition be, and the same is hereby, denied.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

* * * * * * * * * *

753 *Order*

At a general session of the Federal Communications Commission held at its offices in Washington, D. C., on the 26th day of March, 1941,

The Commission having under consideration the proceedings upon the application of Matheson Radio Company, Ins., Boston, Massachusetts, Docket 5453, for construction permit to increase the power of Station WHDH from 1 kw to 5 kw and the hours of operation from daytime and until sunset at Denver, Colorado, to unlimited time, using directional antenna at night; and

IT APPEARING that Proposed Findings of Fact and Conclusions of the Commission (B-121) were made and entered therein on December 5, 1940; that exceptions thereto and request for oral argument was filed by the Berks Broadcasting Company (WEEU), intervener, and that the Commission allowed participation in the oral argument and the filing of briefs *amici curiae* by National Broadcasting Company (KOA) and the so-called "Clear Channel Group", and that oral argument was held thereon before the Commission on February 20, 1941; and

The Commission having considered fully the entire record in the said proceedings, including said Proposed Find-

ings of Fact and Conclusions of the Commission, the exceptions filed thereto, the arguments thereon, and the briefs *amici curiae* filed by National Broadcasting Company (KOA) and the "Clear Channel Group", and being fully advised in the premises,

IT IS ORDERED, That said Proposed Findings of Fact and Conclusions of the Commission BE, AND THE SAME ARE, HEREBY MADE A PART HEREOF BY REFERENCE AND ADOPTED as the final Findings of
754 Fact and Conclusions of the Commission;

IT IS FURTHR ORDERED, That the Rules and Regulations governing standard broadcast stations, as amended pursuant to the Commission's Order of September 11, 1940, BE, AND THE SAME ARE, HEREBY AMENDED by striking the figure 850 from Subsection (a) of Section 3.25, and adding the figure 850 immediately following the figure 810 in Subsection (b) of Section 3.25; and

IT IS FURTHER ORDERED, That the application of Matheson Radio Company, Inc. (WHDH) for construction permit, Docket 5453, BE, AND IT IS HEREBY, GRANTED.

This Order shall become effective April 7, 1941.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

* * * * * * * * * *

755 *For Construction Permit*

Case and Craven, Commissioners, dissenting.

This application was filed and prosecuted in violation of a rule of this Commission promulgated after a general hearing in which the whole industry, including this applicant, was represented. Other licensees of this Commission who applied were denied the right to intervene in the hearing of this particular case. No petition was filed by this applicant to waive or modify the rule for this particular

application. In the final order the Commission, on its own motion and without notice to the industry and disregarding its determination of the general policy as promulgated in the rules adopted, has taken the unprecedented action so far as this Commission is concerned of changing a rule in this particular case to allow the granting of this application which was theretofore in violation of the rule.

This invites other applicants to file applications in violation of and without regard to the rules of this Commission. It discriminates against those who have relied upon the rules of the Commission and not filed applications for frequencies which they might desire, and which the rules of the Commission did not permit them to have. This discrimination is inequitable and not in accordance with the best administrative or judicial practices.

We adopt our Proposed Findings of Fact and Conclusions dated December 10, 1940, (mimeograph 45436), wherein we dissented from the Proposed Findings of Fact and Conclusions of the majority, as our Findings of Fact and Conclusions in this case, and hereby incorporate them as part of this dissenting opinion by reference.

767 *Petition of National Broadcasting Company, Inc., For Rehearing.*

Now comes National Broadcasting Company, Inc., (hereinafter referred to as "National" or "Petitioner") and, pursuant to the provisions of Section 405 of the Communications Act of 1934, alleging that it is a person aggrieved and whose interests are adversely affected thereby, requests that the Commission grant a rehearing in the matter of its Decision and Order of April 7, 1941, amending Section 3.25 of its Rules and Regulations and granting the application of Matheson Radio Company, Inc., (hereinafter sometimes referred to as the "Applicant"). In support of this Petition National respectfully represents as follows:

1. Petitioner is the licensee of radio station KOA which said station has been in continuous operation at Denver, Colorado since December 15, 1924. For more than

768 twelve years, prior to the reallocation of stations on March 29, 1941 pursuant to the North American Regional Broadcasting Agreement, KOA had been authorized to operate unlimited time with power of 50 kw on the frequency 830 kc. Under Orders of the Commission effective March 29, 1941 and in conformity with the terms and provisions of the North American Regional Broadcasting Agreement said station is now assigned to the frequency 850 kc.

2. Applicant is the licensee of radio station WHDH at Boston, Massachusetts, which said station was first licensed on June 17, 1929, to operate at Gloucester, Massachusetts, with power of 1 kw on the frequency 830 kc during daytime only or until sunset at Gloucester. By subsequent authorizations, namely, on May 24, 1930 and November 1, 1932 said station was authorized to increase its hours of operation until sunset at Denver and to change its transmitter location to Saugus, Massachusetts. Said station is now also assigned to the frequency 850 kc.

3. Continuously between November 11, 1928 and April 7, 1941 the Rules and Regulations of the Federal Radio Commission and of the Federal Communications Commission provided that the frequency of 830 kc (850 kc) upon which KOA and WHDH were licensed to operate should be classed as a clear channel upon which only one station would be permitted to operate at night. Throughout this period KOA, being classed as the dominant clear channel station, has been authorized and permitted to operate at all times without co-channel interference at night from any other station in the United States. Since 1928 KOA has been protected from co-channel interference from any Canadian sta-
769 tion pursuant to agreements existing between the Governments of the United States and Canada. Since March 29, 1941, (except for the action taken by the Commission in this proceeding on April 7, 1941) KOA's service and service area within the United States has also been entitled to protection from all stations in Canada, Mexico and Cuba under the provisions of the North American Regional Broadcasting Agreement.

4. Since December 18, 1935, the Rules and Regulations of the Commission have contained the following provisions now found in Section 1.72 of said Rules and Regulations:

"Any application which is not filed in accordance with the Commission's Regulations will be considered defective. * * * Such defective applications will not be considered by the Commission, but will be returned to the applicant by the Secretary, with a brief statement of the respect in which it is defective."

5. Since August 1, 1939, Section 1.71 of the Commission's Rules and Regulations has contained the following provisions:

"Each application for an instrument of authorization shall comply with the Commission's Rules and Regulations and shall be made in writing, subscribed and verified as provided in Section 1.121 on a form furnished by or in the manner prescribed by the Commission: * * * Provided, further, that in cases where an applicant desires a modification of a Rule or Regulation he shall submit a formal Petition setting forth the desired change and the reasons in support thereof. The required forms may be obtained from the Commission or from any of its field offices. (For a list of such offices and related geographical districts see appendix No. 3)."

770 6. The application of Matheson Radio Company, Inc., granted by the Commission on April 7, 1941, requested the use of power of 5 kw with a directional antenna during unlimited hours of operation.[1] Said application was filed July 27, 1938.[2] Neither the application nor any other

[1] Between 1929 and 1938, notwithstanding that Regulations of the Commission at all times prohibited a second station operating at night on the frequency 830 kc, applicant filed nine separate applications, each of which requested the unlimited time operation of WHDH on the frequency 830 kc. All of these applications prior to the one involved in the instant case (dated July 27, 1938) were dismissed or denied by the Commission.

[2] Between June 6 and June 30, 1938, the Commission conducted a general legislative hearing for the purpose of re-examining the existing allocation structure and of determining, among other things, what if any changes should be made in its Rules and Regulations relating to clear channel stations and clear channel service. Applicant appeared at this hearing and urged modification of the Commission's Rules so as to permit operation of WHDH during night

document submitted by the applicant with said application or relating thereto requested a modification of Section 3.25 of the Commission's Rules and Regulations. On the contrary the applicant has repeatedly denied that it desired to urge any change in or modification of the Commission's Rules and Regulations.[3]

7. On January 3, 1939, and notwithstanding the procedural requirements of the Commission's Rules and Regulations and the applicant's failure to meet the same,
771 the Commission designated the WHDH application for hearing before Commissioner Case. Its Notice of Hearing dated September 2, 1939, specified the following issues:

1. To determine whether the interests of any other stations may be adversely affected by reason of interference, particularly stations KOA, WRUF, WEEU and WABC;

2. Because of the pendency of another application with which conflict may be had by reason of interference, ie; B3-P-2408 (WRUF);

3. To determine whether public interest, convenience or necessity would be served by modifying the Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25; (Part III), to authorize the operation of WHDH as proposed;

4. To determine whether station WHDH, operating as proposed on 830 kc with 5 kw power would render the type of service for which said frequency is designed under the

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time (Docket 5072-A stenographic transcript pages 1897-1907; NAB Reprint pages 316-17). But the Commission on June 23, 1939 promulgated Rules effective August 1, 1939, Sections 3.22 and 3.25 of which reaffirmed the status of the frequency 830 kc and retained that frequency as a clear channel upon which not more than one station would be permitted to operate during night time.

[3] On October 6, 1939 in a pleading entitled "Opposition To Motions To Dismiss and Explanation of Application" applicant stated: "It (the WHDH application) reveals that applicant is not asking to repeal a Regulation of the Commission. Applicant is asking not for the Rule to be abrogated, but that an exception be made in applying it in the interests of serving the Boston area." At page 14 of the Transcript of testimony applicant's counsel stated: "Mr. Examiner, I propose to make it clear before we start that we are not suggesting an amendment, or change or a modification of the Rule; we are not attacking the Rule."

Commission's plan of allocation and Standards of Good Engineering Practice.

8. On February 23, 1939, Petitioner filed a Petition to Intervene in any proceedings relating to the WHDH application. In said Petition it was alleged, among other things, that the operation of WHDH as proposed would cause interference to KOA in areas where KOA's signal is now interference free; that Petitioner would be aggrieved and its interests adversely affected should WHDH be authorized to operate as proposed; and that the operation of WHDH as proposed; would not be in the public interest, convenience and necessity. This Petition to Interference was
772 denied by Commissioner Payne on October 2, 1940 and, on October 10, 1940, a Petition to Review his action, filed under Section 1.256, was also denied by the Commission.

9. On September 29, 1939, Petitioner filed a Motion to Dismiss the WHDH application because said application was patently in conflict with Sections 3.22 and 3.25 of the Commission's Rules and Regulations and because of the failure of the applicant to conform to the requirements of Section 1.71 of the Commission's Rules and Regulations. The relief requested by Petitioner was that the hearing then scheduled upon said application be cancelled and that the application be dismissed and returned to the applicant. This Motion was denied by the Commission on December 5, 1939.

10. On December 2, 1939, the Commission, on its own motion, issued a second Notice of Hearing to replace the Notice originally issued on September 2, 1939, as aforesaid, which said Notice specified the following issues:

1. To determine whether or not the Commission's Rules and Regulations Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and applied preclude the granting of the application.

2. To determine the nature, extent and effect of any interference which would result should the applicant's pro-

posed station operate simultaneously with stations KOA, WRUF, WEEU and WABC;

3. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with stations WRUF operating as proposed in its pending application (File B3-P-2408).

773 11. On January 29, 1940, a hearing was held upon the second or substituted Notice of Hearing before an Examiner of the Commission which said hearing was followed on December 9, 1940, by the issuance of the Commission's "Proposed Findings of Fact and Conclusions". In said "Proposed Findings of Fact and Conclusions" three of the five members of the Commission present and participating proposed that Section 3.25 of the Commission's Rules and the Regulations be amended so as to alter the status of the frequency 830 kc to permit the nighttime operation of WHDH as proposed in the pending application and also recommended that said application be granted. Two Commissioners dissented in a separate opinion released on the same day. The sixth Commissioner did not participate and, at that time, there was one vacancy on the Commission. All five Commissioners participating in the action agreed that, properly interpreted and applied, the Commission's Rules prohibited the simultaneous night operation of KOA and WHDH (Majority Findings paragraph 7, Dissent paragraph 6).

12. On December 16, 1940, and after being advised of the contents of the Commission's "Proposed Findings of Fact and Conclusions", Petitioner filed a second Petition to Intervene in which, among other things, it requested that it be permitted to:

(a) File a motion to reopen the proceedings in order to afford Petitioner an opportunity to introduce evidence, cross examine all witnesses and otherwise participate fully in the proceedings.

(b) Upon such record file Proposed Findings of Fact and Conclusions of Law.

(c) Have the right to file exceptions to any proposed Commission Decision thereafter issued.

774 (d) Request Oral Argument upon such decision and upon exceptions thereto and

(e) In all respects participate fully in the important issues involved in the application of Matheson Radio Company, Inc.

Said Petition was denied by order of the Commission dated January 7, 1941, at which time it was announced that Petitioner would be permitted to file a brief amicus curiae.

13. Thereafter on January 27, 1941, Petitioner filed its Brief amicus curiae and, on February 20, 1941, Oral Argument was had before the Commission in which Petitioner was permitted to participate not as a party in interest but again as amicus curiae. On March 27, 1941, the Commission publicly announced that it had adopted the "Proposed Findings of Fact and Conclusions" made public on December 9, 1940, by a vote of three to two with two members not participating. On April 7, 1941, a formal Order to this effect was promulgated effective on the same day.

14. Petitioner alleges:

That the action of the Commission in changing the status of KOA from that of a Class I-A station to that of a Class I-B station and the granting of the application of Matheson Radio Company, Inc., will have immediate and far reaching results of a prejudicial nature, not only upon the Petitioner but upon the service available to all listeners throughout the United States who are dependent upon service from stations located within the United States,

That except within the Boston metropolitan area the operation of station WHDH at night with power of 5 kw as proposed will create such serious co-channel interfer-

775 ence between KOA and WHDH that neither station will be able to render a useful service throughout all that portion of the United States which, generally speaking, lies east of the Mississippi River.

That by amending Sub-sections (a) and (b) of Section 3.25 of its Rules and Regulations the Commission has re-

duced the area within which KOA is entitled to be free of co-channel interference from the entire area of the United States to that area within 720 miles of Denver, Colorado and,

That, taken together, the granting of the WHDH application and the amendment to the Commission's Rules and Regulations brings into operation paragraph B 8 (d) of Part II of the North American Regional Broadcasting Agreement which will operate to the prejudice of the priority rights of the United States on this channel.[4]

15. Petitioner further alleges that the Commission's action of April 7, 1941, was taken after a proceeding in which Petitioner was twice refused permission to intervene; under a Notice of Hearing which indicated clearly that modification of its Regulations would not be considered by the Commission; upon an ex parte record made before an Examiner which is barren of any evidence of the nature and extent of the service rendered by KOA, except such as the applicant saw fit to offer for its own purposes without cross-examination or rebuttal by National; upon a record which is likewise barren of any evidence of the nature and extent of
776 the service rendered by WHDH or to be rendered by WHDH; and that the entire proceeding furnishes no basis for determining the relative need for service of listeners in the Boston area as against those living in the area served by KOA.

Specifications of Error.

In entering its said Decision and Order of April 7, 1941, the Commission acted erroneously and beyond any power

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[4] Paragraph B 8 (d) of Part II of this treaty reads:

"(d) If within the period of this agreement the country to which a clear channel has been assigned shall have made use of the channel but not in the manner above prescribed or not to the extent required by the provisions of this agreement, such country shall be considered as having relinquished that portion of the rights which it has not used and at the expiration of this agreement the other countries party thereto shall have the right, if they see fit, to withdraw the unused privileges from such country and to reassign them to any or all of the other interested countries."

conferred upon it by the Communications Act of 1934 in each of the following particulars:

(1) The Commission erred in failing to return the WHDH application to the applicant without action as a defective application under Section 1.72 of its Rules.

(2) The Commission erred in denying the Petition to Intervene filed by National September 23, 1939.

(3) The Commission erred in denying the Motion to Dismiss the WHDH application filed by National September 29, 1939.

(4) The Commission erred in denying the Petition to Intervene filed by National December 16, 1940.

(5) The Commission's Decision and Order of April 7, 1941 is contrary to law for each of the following reasons:

(a) It results in a substantial modification of the license held by National authorizing it to operate radio station KOA without having afforded National an opportunity to be heard as required by Section 312 (b) of the Communications Act of 1934.

(b) It results in a change in the class and character of the frequency of radio station KOA without the consent of the licensee of said station and without affording said
777 licensee an opportunity to be heard as required by Section 303 (f) of the Communications Act of 1934.

(c) It results in a degradation of service on 830 kc (850 kc) which will be prejudicial to the priority rights of the United States on this channel under Paragraph B 8 (d) of Part II of the North American Regional Broadcasting Agreement without affording National an opportunity to be heard on its own behalf and on behalf of the listeners it serves.

(d) It results in a discrimination against service to rural listeners in order to furnish additional service to the residents of the City of Boston and as such is violative of the requirements of Section 307 (b) of the Communications Act of 1934.

(e) It effects a change in the policy of the Commission with respect to the use of the frequency 830 kc (850 kc) and authorizes and directs a new kind of use of said frequency after a hearing before an examiner contrary to Section 409(a) of the Communications Act of 1934.

(f) The Commission was without power to grant the WHDH application except after a hearing upon issues clearly defined and after affording National an opportunity to participate fully in such hearing.

(g) The Commission was without power to take any action upon the WHDH application except to return said application to the applicant as required by Section 1.72 of its Rules and Regulations.

(h) The Commission was without power under its Notice of hearing dated December 2, 1939, either to amend its Rules and Regulations fixing the status of the frequency 830 kc (850 kc) or to grant the WHDH application which was clearly in conflict with said Rules and Regulations.

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(i) The Commissioner was without power to grant the WHDH application except after a full hearing in which the burden of proof was upon the applicant to show that the granting of its application would make for a fair, efficient and equitable distribution of radio service and would in all respects serve the public interest, convenience, and necessity.

(6) The Decision and Order complained of is erroneous, arbitrary and capricious, in that it constitutes an attempt by the Commission while acting in its quasi-judicial capacity to ignore and retroactively to repeal its own pronouncements promulgated while acting in its legislative capacity.

(7) The Decision and Order complained of is arbitrary and capricious in that, despite applicant's express disavowal of such a purpose, it is predicated upon a proposal for a new kind of use of the frequency 830 kc (850 kc) concerning which National had no due and timely notice, upon which it was not heard prior to the issuance of said final Decision and Order.

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(8) The Decision and Order complained of is arbitrary and capricious in that it is predicated upon a proposal for the use of the frequency 830 kc (850 kc) advanced by the Commission subsequent to the issuance of its second Notice of Hearing which Notice clearly indicated that such a proposal would not be considered.

(9) The Decision and Order complained of was made without affording National the type and character of hearing required by the Communications Act of 1934.

779 (10) The Findings and Conclusions of the Commission are insufficient to support the Decision rendered and do not fairly report and represent the evidence in the record.

(11) The evidence is insufficient to support the Commission's Decision and Order in that it affords no basis for a comparison of the services rendered by radio stations WHDH and KOA.

(12) The evidence is insufficient to support the Commission's Decision and Order in that it fails to afford any basis for a determination of the relative scope, character and quality of the radio services available to the residents of Boston and the area adversely affected by the granting of the WHDH application.

(13) The Decision and Order complained of is illegal, void and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States in that it is based upon facts and issues concerning which National was denied a hearing at any stage of the proceedings.

Relief Requested.

Wherefore, Petitioner respectfully prays:

1. That the Commission reconsider its said action of April 7, 1941, and vacate its said Decision and Order amending Section 3.25 of its Rules and Regulations and granting the application of Matheson Radio Company, Inc., (WHDH) and,

2. That the Commission enter its Order denying said application upon the basis of the proceedings already had or,

3. That the Commission conduct such further proceedings with respect to said application as shall be consistent with its Rules and Regulations, to-wit:

780 (a) That said application be returned to the applicant as defective pursuant to the provisions of Section 1.72 of the Commission's Rules and Regulations.

(b) That applicant be instructed that if it desires a modification of Section 3.25 of the Commission's Rules and Regulations that it follow the procedure required by Section 1.71 of said Rules and Regulations.

(c) That if and when said application is designated for hearing by the Commission upon issues clearly defined Petitioner be permitted to appear and participate fully in the taking of evidence and in any other procedural steps relating to said application taken pursuant to the provisions of Section 1.231 of the Commission's Rules and Regulations.

Respectfully submitted,

NATIONAL BROADCASTING COMPANY, INC.,

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838 *Decision and Order on Petition for Rehearing*

By the Commission: (Commissioners Case and Craven voting "No"; Commissioner Wakefield not participating; Chairman Fly not present.)

This is a petition for rehearing filed April 25, 1941 by the National Broadcasting Company, Inc. (KOA), Denver, Colorado. It is directed against the Commission's action of April 7, 1941: (1) adopting as final the Proposed Findings of Fact and Conclusions made and entered by the

Commission December 5, 1940 in the matter of the application of Matheson Radio Company, Inc. (WHDH), Boston, Massachusetts, for construction permit (B1-P-2201—Docket No. 5453); (2) granting the application of Matheson Radio Company, Inc. (WHDH) for construction permit for increased power and nighttime operation; and (3) amending the rules and regulations of the Commission governing standard broadcast stations so as to strike the figure 850 from Subsection (a) of Section 3.25, and adding the figure 850 immediately following the figure 810 in Subsection (b) of Section 3.25.

I—History of Proceedings

On October 25, 1938, Matheson Radio Company, Inc. (WHDH), Boston, Massachusetts, was operating on the frequency 830 kc daytime and until sunset at Denver, Colorado, with the power of 1 kw. On that date, Matheson filed an application for construction permit requesting an increase in power to 5 kw, and in hours of operation to unlimited time, using a directional antenna at night. Petitioner, National Broadcasting Company, Inc. (KOA), Denver, Colorado, was then using the frequency 830 kc[1] unlimited time with power of 50 kw. Each of these assign-
839 ments was made in accordance with the Commission's then effective rules.[2]

[1] Under the provisions of the North American Regional Broadcasting Agreement stations which were on March 29, 1941, assigned to the frequency 830 kilocycles, were shifted to 850 kilocycles. Station KOA is now authorized to use 850 kc with 50 kw power, unlimited time.

[2] Insofar as these rules are here material, they were as follows:

"70. For the purposes of allocation of frequencies * * * broadcast stations are classified as follows: * * * a. Clear channel. * * *"

"72. The term 'clear channel station' means a station licensed to operate on a frequency designated as a clear channel. (See par. 116)"

"77. The term 'limited time station' means a station licensed to operate on a frequency designated as a clear channel, during daytime, and until local sunset, or until sunset at the dominant clear channel station, and in addition, during night hours, if any, not used by the dominant clear channel station."

"116. The following frequencies are designated as clear channels and are allocated for use by clear channel stations * * *. * * * 830 * * * kilocycles."

"117. The authorized power of a dominant clear channel station shall be not less than 5 kilowatts nor more than 50 kilowatts."

The foregoing rules were on August 1, 1939, superseded by sections 3.21(a), 3.22(a), 3.23(a) and (b), 3.24 and 3.25, of the Commission's present rules.

The Matheson application was in proper form and available for Commission consideration. Upon examination thereof, the Commission was unable to determine that a grant would serve public interest, convenience, and necessity. Accordingly, on January 3, 1939, the Commission designated the application for hearing.

Several petitions to intervene in the hearing were filed,[3] of which only one, filed by the petitioner, is material
840 to this proceeding. That petition was denied by the presiding Commissioner on September 29, 1939, on the basis of a written opinion entered the same day in Docket No. 5698, *In re Application of Hazelwood, Inc.*, Orlando, Florida.[4]

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[3] Rule 1.102 on Intervention is as follows:

"Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, *the facts on which the petitioner bases his claim that his intervention will be in the public interest*, and must be subscribed or verified in accordance wih Section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same." (Emphasis supplied).

[4] The Hazelwood decision stated in part:

"The underlying purpose of the Commission in adopting its present rule on intervention (1.102) was to correct a practice which had become prevalent under the prior rule of the Commission relating to intervention. Under its former rule, the Commission permitted any person to intervene in a hearing if his petition disclosed 'a substantial interest in the subject matter'. This standard was so broad and the Commission's practice under it was so loose that intervention in Commission hearings came to be almost a matter lying in the exclusive discretion of persons seeking to become parties to Commission proceedings. The experience of the Commission during the past few years clearly demonstrated that the participation of parties other than the applicant in broadcast proceedings in a great many cases resulted in unnecessarily long delays and expense to both the Commission and applicants without any compensating public benefit. In many cases the major function served by intervenors was to impede the progress of the hearing, increase the size of the record, confuse the issues and pile up costs to the applicant and to the Commission through the introduction of cumulative evidence, unnecessary cross examination, dilatory motions, requests for oral argument and other devices designed to prevent expeditious disposal of Commission business.

"The underlying purpose of the present rule is to limit participation in proceedings, particularly on broadcast application, to those persons whose participation will be of assistance to the Commission in carrying out its statutory functions. The present rule requires a petitioner to set forth not only his interest in the proceeding but also 'the facts on which

841 On October 10, 1939, the Commission en banc affirmed the action of the presiding Commissioner denying National's petition to intervene.

On December 2, 1939,[5] a notice was issued by the Commission announcing that the Matheson application would be heard upon certain issues therein stated. Insofar as these issues are here material they were:

"(1) To determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III), properly interpreted and applied, preclude the granting of the application[6];

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the petitioner bases his claim that his intervention will be in the public interest'. The fact that a proposed intervenor may have the right to contest in a court the validity of an order granting or denying a particular application does not in and of itself mean that such a person is entitled as a matter of right to be made a party to the proceedings before the Commission on such application. Intervention in proceedings before administrative agencies like the Federal Communication Commission is ordinarily covered by statutory provision. The Communications Act contains no provisions giving the right of intervention in proceedings before the Commission to any person or class of persons, but expressly provides that the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. By the adoption of Rule 1.102 the Commission in effect has declared that it will conduce to the proper dispatch of business and to the ends of justice if it permits intervention in a proceeding before it only if the making of a record in which the facts are fully and completely developed, is facilitated by permitting the requested intervention. It is this theory—that where the public will benefit through aid or assistance given to the Commission or the applicant by a party intervenor in a broadcast hearing, such participation should be permitted—which underlies Rule 1.102.

"The petition of the Orlando Broadcasting Company, Inc., utterly fails to meet the requirement of the present rule on intervention. Insofar as it requests permission to participate in the hearing already designated on the application of Hazelwood, Inc., it simply prays that the petitioner be made a party and be allowed to present 'evidence.' Not the slightest intimation is given as to the type of evidence which the petitioner desires to adduce or what petitioner intends to prove by the introduction of such evidence. * * *"

[5] The numerous motions and petitions filed in this proceeding delayed the issuance of this notice of hearing. Many of these motions and petitions are not here material and hence references to them have been omitted.

[6] Sections 3.22 and 3.25 of the Commission's Rules (Part III) are as follows:

"3.22 CLASSES AND POWER OF STANDARD BROADCAST STATIONS (a) *Class I station.*—A 'class I station' is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free

842 "(2) To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with Stations KOA * * *"

On January 29, and 30, 1940, the hearing was held on the Matheson application before an examiner designated by the Commission. Proposed findings were filed by the applicant March 15, 1940. On December 5, 1940, Proposed Findings of Fact and Conclusions of the Commission (Case and Craven, Commissioners, dissenting) were made and entered proposing to grant the Matheson application and to amend subsections (a) and (b) of section 3.25 of the Commission's Rules by striking the reference to the frequency 830 (850) kc from subsection (a) of Section 3.25, and by adding the figure 830 (850) immediately following the figure 810 in subsection (b) of section 3.25.[7]

The Commission found, inter alia:

"6. * * * the issuance of an authorization as applied for by applicant would not be in accordance with Section 3.25 of its Rules. Section 3.25(a) of the Rules limits the use of the frequency 830 (850) kc to one full-time station of 50 kw power; the applicant proposes to operate its station nighttime simultaneously with the station already assigned to the frequency."

"7. * * * operation of Station WHDH nighttime, with directional antenna, as proposed by applicant, would not

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from interference except from stations on the adjacent channel, and from stations on the same channel, in accordance with the channel designation in section 3.25 or in accordance with the 'Engineering Standards of Allocation'. The operating power shall be not less than 10 kilowatts nor more than 50 kilowatts." (Also see Section 3.25 (a) for further power limitation).

"3.25 CLEAR CHANNELS; Classes I and II.—The frequencies in the following tabulation are designed as clear channels and assigned for use by the classes of stations as given:

(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: * * * 850 * * *. The power of the Class I stations on these channels shall not be less than 50 kilowatts.

(b) To each of the channels below there may be assigned class I and class II stations: * * *."

[7] See *infra* p. 17.

cause any interference to the primary service of Station KOA, Denver, Colorado, and * * * such interference as the proposed operation of WHDH might reasonably be expected to cause to reception of KOA would be limited to receivers in the eastern half of the United States. Any use which might be made of the signal of KOA in the
843 area where same might be affected by proposed operation of WHDH would be dependent upon the characteristics of the individual receiver, the signal intensity available, and signal to interference ratio involved in each individual case."

* * * *

"10. The granting of a permit therefor and operation of Station WHDH as proposed by applicant will enable it to deliver service of primary signal quality to an area having a population of 3,093,000 or 621,000 more people than are now included within the primary service area of the station. The hours of operation of applicant station will be extended two and one-half hours during summer months, and a maximum of five and one-half hours during winter months. This will provide a new primary service to 94.9% of the Boston metropolitan area, including a population of 2,185,000. In addition to the aforementioned improvements and extension of service to residents in the Boston area, there will be an improvement and extension of service which applicant station now endeavors to render over the fishing banks situated off the New England coast."

11. * * * with respect to the proposed use of the frequency 830 (850) nighttime at Boston simultaneously with the present use of the frequency at Denver, * * * such operation would permit more efficient use of the frequency * * *"

On December 16, 1940, petitioner filed a second petition to intervene " * * * in order that, as a party, it may: (1) renew its motion to dismiss the WHDH application,[*] (2)

[*] A previous motion filed by National to dismiss the Matheson application had been dismissed on December 6, 1939.

file a motion to reopen the proceedings in order to afford petitioner an opportunity to introduce evidence, to cross-examine all witnesses, and otherwise to participate fully in the proceedings, (3) * * * file proposed findings of fact and conclusions of law, (4) have the right to file exceptions to any proposed Commission decision thereafter issued, (5) request oral argument upon such proposed decision and upon its exceptions thereto, and (6) in all respects fully participate in the issues involved in the application of Matheson Radio Company, Inc." This petition, like National's previous petition to intervene did not comply with Section 1.102 of the Commission's Rules on intervention in that it did not state "the facts on which petitioner bases his claim that his intervention will be in the public interest." Nor was the petition in effect anything more than a premature petition for rehearing. Accordingly, the petition was denied on January 7, 1941, but National was granted permission to submit a brief as *amicus curiae*. The Berks Broadcasting Company (WEEU) (an intervenor whose participation in this proceeding is not here material), requested oral argument which was granted by the Commission, and National was permitted to participate in the oral argument as *amicus curiae*. The oral argument was had before the Commission February 20, 1941. On April 7, 1941, the Commission (Case and Craven Commissioners, dissenting), adopted as final the Proposed Findings of Fact and Conclusions of the Commission made and entered December 5, 1940, amended the Rules and Regulations Governing Standard Broadcast Stations, as aforesaid, and granted the application of Matheson Radio Company, Inc. (WHDH), for construction permit.

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On April 11, 1941, National filed a petition for stay of the foregoing action of the Commission April 7, 1941, (a) "until after the Commission shall have had an opportunity to take action upon a petition for rehearing which this petitioner intends to file on or before April 27, 1941" or (b) "until after the conclusion of any rehearing which

may be held subsequently should the Commission grant its petition for rehearing" or (c) "until after a final determination of proceedings which petitioner intends to institute in the United States Court of Appeals for the District of Columbia for judicial review of the Commission's action."

On April 22, 1941, the Commission denied the petition for stay on the ground that "the sole basis for the relief requested in the Petition for Stay is an allegation of 'great and irremediable damage' to the private rights of petitioner without any facts to support it and that, therefore, petitioner has failed to state a ground for Stay." On its own motion, however, the Commission suspended its action of April 7, 1941, "pending the filing by National Broadcasting Company, Inc. (KOA) * * * of a Petition for Rehearing and the determination thereon by the Commission, or until further order of the Commission", because it appeared "upon an independent examination of the facts and circumstances that public interest, convenience and necessity will be served" thereby.

On April 25, 1941, National filed a petition for rehearing directed against the action of the Commission April 7, 1941. On May 7, 1941, Matheson Radio Company, Inc. (WHDH) filed an opposition to the petition for rehearing.

II—Allegations of the Petition for Rehearing

The petition alleges thirteen grounds of error. Stripped of all repetition, these thirteen grounds boil down to the following allegations:

1. That the Commission erred in failing to return the Matheson application to the applicant without action as a "defective" application under section 1.72 of its Rules, and was without power to take any action upon this application except to return it.

2. That the Commission erred in refusing petitioner the right to intervene in the hearing on the Matheson application. Petitioner asserts that the Commission had no power under the Act to grant the Matheson application "except

after a hearing upon issues clearly defined and after affording National an opportunity to participate fully in such hearing."

845 3. That Section 303(f) of the Act requires the Commission to afford petitioner an opportunity to be heard prior to the amendment of Section 3.25 of the Rules.

4. That the grant of the Matheson application "results in a degradation of service on 830 kc. (850 kc) which will be prejudicial to the priority rights of the United States on this channel under Paragraph B 8(d) of Part II of the North American Regional Broadcasting Agreement without affording National an opportunity to be heard on its own behalf and on behalf of the listeners it serves."

5. That the grant of the Matheson application "results in a substantial modification of the license held by National authorizing it to operate Radio Station KOA", and Section 312(b) of the Communications Act of 1934 requires the Commission to afford KOA an opportunity to be heard prior to such a grant.

6. That the decision of the Commission effects a change in the policy of the Commission with respect to the use of the frequency 850 kilocycles and authorizes and directs a new kind of use of said frequency. It is alleged that the Commission was without power, under Section 409 of the Communications Act of 1934, to effect such a change after a hearing before an examiner.

7. That the findings and conclusions of the Commission are insufficient to support the decision rendered and do not fairly report and represent the evidence in the record; that the evidence is in sufficient to support the Commission's decision "in that it affords no basis for a comparison of the services rendered by Radio Stations WHDH and KOA" and "it fails to afford any basis for a determination of the relative scope, character and quality of the radio services available to the residents of Boston and the area adversely affected by the granting of the WHDH application."

8. That the decision is in violation of the requirements of Section 307(b) of the Communications Act of 1934 in that it results in a discrimination against service to rural listeners in order to furnish additional service to the residents of the City of Boston.

III—Discussion of the Allegations of the Petition

(1) We do not agree that the Commission was required to return the Matheson application without action as "defective" under our Rules, or that our Rules deprived us of the power to take any action upon this application except return it. Under the rules in effect when the Matheson application was filed, it was not "defective". The application was "in writing, under oath of the applicant, and on forms furnished by * * * the Commission";[9] two copies of the application were filed with the Commission at its
846 offices in Washington, D. C.;[10] the application was specific with regard to the frequency, power, hours of operation, and all other terms of the instrument of authorization requested;[11] and the applicant's answers to the questions set forth in the application forms were complete.[12] It was, therefore, available for consideration by the

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[9] "103.1 Each application for an instrument of authorization shall be made in writing, under oath of the applicant, and on forms furnished by or in the manner prescribed by the Commission: * * *"

[10] "103.7 Each application for construction permit * * * with respect to the number of copies and place of filing, shall be submitted as follows: * * * 2 copies direct to Washington, D. C."

[11] "103.9 Each application shall be specific with regard to frequency or frequencies, power, hours of operation and all other terms of the instrument of authorization requested. An application for broadcast facilities in the band 550 kc 1600 kc shall be limited to one specific frequency. * * *"

[12] "104.1 * * * Any application which is not filed in accordance with the Commission's regulations with respect to the form used, manner of execution and completeness of answer to questions therein required will not be considered by the Commission. Each such application shall be returned to the applicant by the Secretary of the Commission, together with a brief statement of the respect in which it is defective."

Rules 103.1, 103.7, 103.9 and 104.1 were superseded by section 4.01 and 4.02 of the Rules effective January 1, 1939 (see pp. 2830 and 2831, *Federal Register*) which in turn were superseded by sections 1.71 and 1.72 of the present rules of the Commission adopted August 1, 1939, as amended December 20, 1940.

Commission under Section 308 of the Communications Act of 1934.

The fact that the Matheson application was still pending and without final action by the Commission when Sec. 1.72[13] was promulgated and made effective did not require
847 the return of the application unconsidered. We think the determination as to whether we should have returned the application, which was proper when filed, required further data or information, acted upon the application as filed, or taken any other action with respect to it, was a matter committed solely to our discretion by Section 4(j) of the Communications Act which empowers us to conduct our proceedings in such a manner as "will best conduce to the proper dispatch of business and to the ends of justice." See also *Federal Communications Commission* v. *The Pottsville Broadcasting Company*, 309 U. S. 134. The petition does not show wherein our discretion was exercised either arbitrarily or capriciously.

(2) Petitioner's contention that the Commission had no power to grant the Matheson application, or to amend Sec. 3.25 without first affording petitioner notice and an opportunity to be heard, and that petitioner was entitled to intervene in the proceedings on the Matheson application is plainly without merit, we think, when examined in the light of our action thereon, and the applicable provisions of the Communications Act of 1934.

Insofar as the Commission's grant of the Matheson application is concerned, Section 309(a) of the Act requires that the Commission grant applications without hearing if upon examination thereof it "shall determine that public

[13] Section 1.72 is as follows:

"Defective applications.—(a) Applications which are defective with respect to completeness of answers to required questions, execution, or other matters of a purely formal character will not be received for filing by the Commission unless the Commission shall otherwise direct.

(b) Applications which have been received for filing but which are not in accordance with the Commission's rules, regulations or other requirements will be considered defective. If an applicant by specific request of the Commission is required to file any documents or information not included in the prescribed application form, a failure to comply therewith will constitute a defect in the application. Such defective applications will not be considered by the Commission."

interest, convenience or necessity would be served by the granting thereof." In the event the Commission upon examination of any such application does not reach such decision with respect thereto, this Section requires that the Commission "shall notify the *applicant* thereof, fix and give notice of a time and place of hearing thereon, and shall afford *such applicant* an opportunity to be heard under such rules and regulations as it may prescribe" (Emphasis supplied). No such right to notice and hearing was conferred upon any person *other than the applicant*, and no duty rests upon the Commission to afford any person *other than the applicant*, an opportunity to be heard.

As we pointed out in our decision in the *Hazelwood* matter,[14] the Act contains no provision giving the right of intervention in proceedings to any person or class of persons, but expressly provides that the Commission may "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." We promulgated Rule 1.102 relating to intervention pursuant to this authority. National's petition, like the petition in the *Hazelwood* case, previously referred to, failed to meet the requirements of this rule, since it did not set forth "the facts on which the petitioner bases his claim that his intervention will be in the public interest." Petitioner did not even allege that it had any evidence to introduce, much less state the type of evidence which the petitioner desired to adduce, or what petitioner intended to prove by participating in the hearing.

Petitioner asserts that its license "entitled" it to operate Station KOA free of co-channel interference, and
848 that the grant of the Matheson application results in reducing the area in which Station KOA is now "entitled" to render service free of co-channel interference. It is further alleged that the grant of the Matheson application results in changing the "character" of the fre-

[14] See note 4, page 3.

quency 850 kc.[15] Therefore, argues petitioner, the grant of the Matheson application constitutes a modification of its license. But, assuming that interference will result to petitioner's station,[16] nothing in the Communications Act of 1934, the rules of the Commission promulgated pursuant thereto, or petitioner's license, entitles petitioner to operate Station KOA free of co-channel interference, nor to operate in any manner other than appears specifically on the face of petitioner's license.[17] This license merely authorizes petitioner to operate specified transmitting equipment for a period of one year, on the frequency 850 kc. with a power of 50 kw, and for unlimited time. It does not expressly or by implication give petitioner a right to serve any particular number of listeners or geographical area or contain any provision designating petitioner's station as a "Class I-A" station.

Although the Commission under Section 303(h) of the Act has been given express authority to "establish areas or zones to be served by any station", it has not done so for standard broadcast stations.[18] Such a provision would not be practicable in the present state of the broadcasting art because all stations using the same frequency, with the same power and operating during the same hours, will not cover like areas or population. The extent of the service derived from the use of frequencies in the band assigned for standard broadcast stations is subject to wide varia-

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[15] I. e., before the grant and change in Rule 3.25 accompanying it, the frequency 850 kc was a "Class I-A" frequency, whereas, as a result of the Commission's Order, the frequency 850 kc has become a "Class I-B" frequency.

[16] See p. 18 *infra*.

[17] Section 301 of the Communications Act of 1934 provides in part: "* * * and no license shall be construed to create any right beyond the terms, conditions, and periods of the license. * * *"

[18] Licenses for High Frequency Broadcast Stations provide for specified service areas in square miles. This is possible in the allocation of High Frequency Broadcast Stations, although it is not possible in the allocation of Standard Broadcast Stations, primarily for the following reasons: (a) The propagation of high frequency signals is subject to fewer variables than is the propagation of standard broadcast signals; (b) unlike Standard Broadcast Stations, High Frequency Broadcast stations render no useful sky-wave service; (c) unlike Standard Broadcast Stations, the sky-wave transmissions from a High Frequency Broadcast Station do not restrict or limit the service area of another High Frequency Broadcast Station.

tions dependent upon skywave propagation conditions, conductivity of the terrain, frequency, efficiency of the particular radiating system employed, static, man-made noises and other factors. A station in one part of the United States may serve more or less population and area than a station in another part of the United States, using the same frequency and power, and operating during the same hours of operation. Moreover, the present allocation of
849 standard broadcast stations is such that as a practical matter each time an application for construction permit, license or modification of license is granted, there is likely to be some change in the population and area of other stations. The Commission, therefore, has not established areas or zones to be served by standard broadcast stations, but instead has provided Standards for normally protected sky-wave and ground-wave contours of stations classified by its Rules. Neither the Standards nor the Rules, however, impart any "rights" to the licensee, but are for administrative convenience of the Commission in the allocation of facilities under the Act.[19] Thus, the grant of an application which, because of electrical interference, may result in curtailment of the population or area served by an existing station, does not "modify" the existing station's license. Any other interpretation would render nugatory Section 309(a) of the Act in so far as that section provides for the grant of applications without hearing, if public interest, convenience, and necessity will be served thereby, because, as a practical matter, virtually no application could be granted without a hearing. The interpretation contended for by petitioner would thus make expeditious and orderly administration of the Communications Act impossible.

Since petitioner has no legal right to be heard in any event, and did not comply with the Commission's rule pro-

[19] See Proposed Finding of Facts and Conclusions, In re: *Application of WREN Broadcasting Company, Inc. (WREN)*, Lawrence, Kansas, Docket No. 5491—June 19, 1940, and Decision and Order, In re: *Beaumont Broadcasting Corporation (KFDM)*, Beaumont, Texas, February 11, 1941 (B3-ML-927). See also footnote 1, page 48—6th Annual Report of F. C. C.

viding for intervention, we think the contention that the Commission erred in not permitting petitioner to intervene is without merit.

We note, too, that our refusal to permit petitioner to intervene did not preclude petitioner if it had so desired from appearing at the hearing on the Matheson application and giving any relevant, material, and competent testimony it may have had. The rules of the Commission expressly so provide.[20] Petitioner did appear at the hearing, but limited its participation solely to noting an exception to the ruling of the Commission denying its petition to intervene. If petitioner had any relevant, material and competent testimony relating to the merits of the Matheson application, it had ample opportunity to present the same. Petitioner can hardly complain now that the record on the Matheson application is deficient because of its own failure to give the Commission the benefit of such information and data as it may have had.

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(3) Petitioner contends that it was error for the Commission to amend Section 3.25 without first affording petitioner notice and an opportunity to be heard thereon and relies on Section 303(f) of the Act which empowers the Commission to:

"* * * Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of the Act: *Provided however*, That changes in the *frequency, authorized*

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[20] Sec. 1.195 of the Rules of the Commission provides in part:

"The will be maintained in the office of the secretary of the Commission a record of all communications received by the Commission relating to the merits of any application pending before the Commission requesting the granting, renewal, modification or revocation of any license or construction permit * * *. Such record shall show the name and address of the person making the statement and the substance of such statement. When the date of hearing has been set, if the matter is designated for hearing, the secretary shall notify all persons shown by the records to have communicated with the Commission regarding the merits of such matter in order that such persons will have an opportunity to appear and give evidence at such hearing; * * *.

"No such person shall be precluded from giving any relevant, material and competent testimony at such hearing because he lacks a sufficient interest to justify his intervention as a party in the matter. * * *".

power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with; * * *" (emphasis supplied).

Neither the amendment to Sec. 3.25 nor the grant of the Matheson application, however, effected a change in the frequency, authorized power, or in the time of operation of petitioner's station KQA. The hours of operation of Station WHDH were changed (increased), but that station expressly requested this change in its application and hence consented thereto. It is clear, therefore, that our action of April 7, 1941, amending Sec. 3.25 did not violate Section 303(f) of the Act.

(4) Petitioner contends that the Commission's action "will be prejudicial to the priority rights of the United States" under paragraph B 8 (d) of Part II of the North American Regional Broadcasting Agreement[21] and
851 could not be taken without affording National an opportunity to be heard. This contention is based upon petitioner's misconception that it is in some manner subrogated to the rights of the United States under the Treaty. But the Treaty recognizes rights only in the signatory governments and does not create in any licensee any vested rights in frequencies or service areas. Moreover, the Treaty does not prohibit the Commission from considering applications for broadcast facilities in accordance

[21] Paragraph B 8 (d) of Part II of this Treaty is as follows:

"If within the period of this agreement the country to which a clear channel has been assigned shall have made use of the channel but not in the manner above prescribed or not to the extent required by the provisions of this agreement, such country shall be considered as having relinquished that portion of the rights which it has not used and at the expiration of this agreement the other countries party thereto shall have the right, if they see fit, to withdraw the unused privileges from such country and to reassign them to any or all of the other interested countries."

with the statutory standard of public interest, convenience and necessity.

Nothing in the North American Regional Broadcasting Agreement gives petitioner any right to be heard prior to the promulgation of the amendment of Section 3.25, and, as we have already pointed out, nothing in the Communications Act of 1934 or in the terms of its license issued pursuant to the Act, gives petitioner any such right.

(5) In so far as petitioner contends that the Commission's Order of April 7, 1941 results in a "substantial modification" of petitioner's license without an opportunity to be heard as required by Section 312(b)[22] of the Communications Act of 1934, we think petitioner misconstrues the Commission's Order. As we have already pointed out in our discussion of point 2, petitioner's license authorizes Station KOA to operate for a period of one year on the frequency 850 kilocycles with a power output of 50 kw and unlimited hours. The instant Order does not change any of the terms of petitioner's existing license. We think, therefore, this contention is without merit.

852 (6) Petitioner's contention that the Commission's Order of April 7, 1941, "effects a change in the policy of the Commission with respect to the use of the frequency 850 kilocycles, and authorizes a new kind of use of said frequency", and that this change was made after hearing before an examiner and is therefore contrary to

[22] Section 312(b) of the Communications Act of 1934 is as follows:

"Any station license after June 19, 1934, granted under the provisions of this chapter or the construction permit required hereby and after such date issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue. (June 19, 1934, c. 652, Sec. 312, 48 Stat. 1086)"

Section 409(a)[23] of the Communications Act of 1934 further misconstrues the Commission's Order.

In considering whether the Commission's Order amending Section 3.25 actually effects a change in the policy of the Commission, it will be helpful to review briefly the history of the allocation of radio broadcast frequencies in the United States.

The Radio Act of 1927 became law February 23, 1927. Its passage was precipitated by the so-called "break down of the law" which followed an opinion of the Attorney General, July 6, 1926, holding that the Secretary of Commerce under existing law had no power to restrict the operation of stations with respect to frequency, power, or hours of operation. Broadcast stations in the United States took advantage of this situation to broadcast on whatever frequencies they pleased with whatever power they desired and whenever they chose. The result was utter chaos for the listening public. In its attempt to bring about order, the Federal Radio Commission undertook at once to put into effect a general reallocation. This reallocation was not based upon any scientific plan and in the late months of 1927 it became apparent that the reallocation was not giving satisfactory results. As a partial step in ameliorating the situation, the Commission, on December 1, 1927, ordered 25 channels cleared, either entirely or partially.[24]

In the meantime, the Commission continued its endeavor to work out an allocation policy for broadcast stations. It invited and received the best engineering advice in the country. As a result of this advice, the Commission, on August 30, 1928, promulgated General Order 40[25] as the

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[23] That part of Section 409(a) of the Communications Act of 1934 which is here material provides: "any member or examiner of the Commission * * * when duly designated by the Commission for such purpose, may hold hearings * * *; except that in the administration of Part III of this Act, an examiner may not be authorized to exercise such powers with respect to a matter involving (1) a change of policy by the Commission * * * or (4) a new kind of use of frequencies * * *."

[24] See p. 9, Second Annual Report of Federal Radio Commission.

[25] See Second Annual Report of Federal Radio Commission, page 48.

first step toward putting into effect a new allocation system. This Order established three types of channels for service by radio broadcast stations in the United States as follows: Clear channels—for use by stations to provide good service to rural and remote listeners; regional channels—
853 for use by stations to provide service primarily to metropolitan districts and rural areas contiguous thereto; and local channels—for use by stations to provide service primarily to cities or towns and suburban or rural areas contiguous thereto.[26]

During the period from 1928 to 1933, the Federal Radio Commission made no change "in the basic plan of allocation of frequencies set up by General Order 40" but minor changes in frequency assignments were made from time to time in order to improve local conditions.[27] During the period from 1934 to 1939 inclusive, no change in the basic plan of allocation set up by General Order 40 was made by the Federal Communications Commission, but individual assignments and changes were made as a result of the granting of applications.[28] Thus, it is apparent from the administrative practice heretofore followed that mere changes in frequencies have never been regarded as "changes in policy" of the Commission.

On June 23, 1939, the Commission, after an extensive hearing, adopted new rules and regulations governing standard broadcast stations and Standards of Good En-

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[26] The following statement was issued by the Federal Radio Commission together with General Order 40: "The Commission is furthermore convinced that within the band of frequencies devoted to broadcasting, public interest, convenience, or necessity will best be served by a fair distribution of different types of service. *Without attempting to determine how many channels should be devoted to the various types of service,* the Commission feels that a certain number should be devoted to stations so equipped and financed as to permit the giving of a high order of service over as large a territory as possible * * * a certain number of other channels should be given over to stations * * * as to which there will be large intermediate areas in which there will be objectionable interference. Finally, there should be a provision for stations which are distinctly local in character and which aim to serve only the smaller towns in the United States * * *." (Second Annual Report of Federal Radio Commission, page 168.) (Emphasis supplied.)

[27] See 3rd, 4th, 5th, 6th, and 7th Annual Reports of the Federal Radio Commission, pages 16, 56, 19, 25 and 18 respectively.

[28] See 1st, 2nd, 3rd, and 4th Annual Reports of the Federal Communications, pages 23, 57, 28, and 51 respectively.

gineering Practice concerning standard broadcast stations effective August 1, 1939. These rules did not affect the basic plan of allocation of broadcast facilities, but sought to unify the plan of allocation of broadcast stations within the United States with that set up by the North American Regional Broadcasting Agreement. As under former rules, the three classes of channels provided were clear, regional and local. The principal changes were these: The new definitions establishing these classes of channels clarified the purpose of each class of channel and in general established the normal protection for stations operating
854 on these channels.[29] With respect to clear channels, these rules provided in part:

"3.25. Clear Channels: Classes I and II—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given:

(a) To each of the channels below there will be assigned one Class I station and there may be assigned one or more Class II stations operating limited time or daytime only: • • • 850 • • • kilocycles.

(b) To each of the channels below there may be assigned Class I and Class II stations: • • •."

The Order of the Commission, April 7, 1941, amended Rule 3.25, in part, as follows:

"3.25. Clear Channels; Classes I and II—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given:

(a) To each of the channels below there will be assigned one Class I station and there may be assigned one or more Class II stations operating limited time or daytime only: • • •

(b) To each of the channels below there may be assigned Class I and Class II stations • • • 850 • • • kilocycles."

It is clear from the foregoing that the amendment with respect to the single frequency 850 does not change, but on

[29] See Page 38, Fifth Annual Report, Federal Communications Commission.

the contrary continues the policy maintained by the Commission prior to April 7, 1941, of providing two classes of clear channel service. Both classes of clear channel stations are "designed to render primary and secondary service over an extended area and at relatively long distances."[39] The amendment merely affects a minor shift in one frequency within the established policy.

Petitioner's contention that the Commission's action results in a "new use" of the frequency 850 kilocycles within the meaning of Section 409 (a) of the Communications Act is similarly without merit. The frequency continues to be assigned for the same kind of service, i. e., standard broadcast. Furthermore, as we have already shown, no change will result in the real nature or purpose of the use of this frequency within the standard broadcast band.

855. (7) Petitioner alleges that the findings and conclusions of the Commission are "insufficient to support the decision rendered and do not fairly report or represent the evidence." The petition does not, however, allege in what particulars these findings and conclusions are insufficient or fail to report and represent the evidence. In this respect, the petition does not comply with Section 1.271 of our Rules of Practice and Procedure which provides that a petition for rehearing "shall state with particularity in what respect the decision, order, or requirement, or any matter determined therein is claimed to be unjust, unwarranted or erroneous, and with respect to any finding of fact must specify the pages of the record relied on."

However, in view of the importance of the matters involved in this proceeding, we shall re-examine our findings and conclusions and the record upon which they are based. Since these findings and conclusions are stated at length elsewhere in this decision, we shall state simply their substance here. Summarized, we found that a grant of that application would not result in interference to the primary service of Station KOA, Denver, Colorado, and that such

[39] See Section 3.22 of the Rules of the Commission.

interference to the reception of Station KOA as might reasonably be expected to result from a grant of the Matheson application would occur in its secondary service area and would be limited to receivers in the eastern half of the United States, remote from the KOA transmitter; that such secondary service as KOA could render in this area would be of uncertain character because of its dependence upon the characteristics of the individual receiver, the signal intensity and the signal to interference ratio involved in each individual case. These findings are supported by the expert opinion of both the applicant's and the Commission's engineer. We found further, that a grant of the Matheson application would enable Station WHDH to render an improved and extended primary service in the Boston metropolitan area and to the fishing banks situated off the New England coast; that the operation of Station WHDH as proposed would permit a more efficient use of the frequency 850 kilocycles than at present. Our review of the record indicates that the evidence supports these findings.

Petitioner further alleges that the evidence is insufficient to support the Commission's decision and order in that "it affords no basis for a comparison of the service rendered by Stations WHDH and KOA" and that "it fails to afford any basis for the determination of the relative scope, character and quality of the radio services available to the residents of the Boston metropolitan area adversely affected by the granting of the WHDH application." Since the record supports a finding that the primary service area of Station KOA will not be interfered with in any way and that the secondary service area of Station KOA would be limited to receivers in the eastern half of the United States and remote from the KOA transmitter where the KOA signal is of uncertain character, it is clear that the WHDH service does not displace the KOA secondary service in any real or substantial sense. It is significant that although petitioner contends it is entitled to serve the rural
856 areas in which it is claimed interference will occur,

it fails to allege either that it has been providing a useful service in such areas or point out, in terms of population, the nature and extent of the claimed interference. Accordingly, there is no occasion for making a comparison of the services rendered by Stations WHDH and KOA.

(8) Petitioner alleges that the Decision and Order herein "results in a discrimination against service to rural residents in order to furnish additional service to the residents of the city of Boston and, as such, is violative of the requirements of Section 307(b) of the Communications Act of 1934." As we have already indicated, our decision and order results in no real or substantial displacement of the service of KOA. We have found that the improvement and extension of service in the Boston area will serve public interest. We think, therefore, that this allegation is without merit.

Accordingly, it is ordered, this 20th day of May, 1941, that the petition for rehearing filed by National Broadcasting Company, Inc. (KOA) be, and it is hereby, denied.

It is further ordered that our Order of April 7, 1941 which was suspended on our own motion April 22, 1941 be, and it is hereby, reinstated.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

* * * * * * * * * * *

857 *Petition For Stay During Appeal*

National Broadcasting Company, Inc., as licensee of station KOA at Denver, Colorado, gives notice of its intention to appeal to the Court of Appeals for the District of Columbia from the Order of the Commission in the above entitled matter dated April 7, 1941, with respect to which its Petition for Rehearing was denied by the Commission on May 20, 1941.

Pending the final determination of such appeal Petitioner respectfully requests the Commission to stay the

amendment of sub-sections (a) and (b) of section 325 of its Rules and to stay the issuance of a construction permit to Matheson Radio Company, Inc., under such Order of April 7, 1941.

In support of its request, petitioner incorporates by reference in this Petition the representations and averments of its Petition for Rehearing dated April 25, 1941 as though fully set forth herein. In further support of its requests Petitioner urges the Commission to grant the same for the same reasons which impelled it upon its own motion to find, on April 22, 1941, that public interest, convenience and necessity would be served by suspending its order of April 7, 1941, pending the filing of Petitioner's Petition for Rehearing and the Commission decision thereon.

Respectfully submitted,

NATIONAL BROADCASTING COMPANY, INC.,

D. M. PATRICK
PHILIP J. HENNESSEY JR.
A. L. ASHBY
HENRY LADNER
Its Attorneys
810 Colorado Building
Washington, D. C.
May 21, 1941

* * * * * * * * * *

871 *Decision and Order on Petition For Stay During Appeal*

By the Commission: (Case and Wakefield, Commissioners, dissenting; Payne and Craven, Commissioners, absent.)

This is a Petition for Stay During Appeal filed by National Broadcasting Company, Inc., licensee of Station KOA, Denver, Colorado. Petitioner alleges that it intends to appeal to the Court of Appeals for the District of Columbia from the Commission's order of April 7, 1941. That order adopted as final the Proposed Findings of Fact and

Conclusions of the Commission proposing to grant the application of WHDH for unlimited hours of operation on 850 kc, with power of 5 kw, and also amended Section 325 of the Rules by removing the frequency 850 kc from the group of frequencies specified in Section 325 (a) and placing it in Section 325 (b).

On April 11, 1941 petitioner filed with the Commission a Petition for Stay pending action by the Commission on the Petition for Rehearing which petitioner alleged it was about to file or until after disposition of the appeal which petitioner alleged it would file if its Petition for Rehearing were denied. The only reason given in support of the petition was that the issuance of a stay would preserve the status quo whereas if a stay were not issued "KOA's status under the Rules and Regulations of the Commission and under the North American Regional Broadcast Agreement as well as its capacity to serve its listeners will be changed materially to its great and irremediable damage without its having been afforded an opportunity to be heard as a party to such action." No facts were alleged showing irremediable injury to petitioner or any injury to the public. Accordingly, the Commission on April 22, 1941 denied the Petition for Stay but on its own motion suspended its action of April 7, 1941 until after the filing of and action upon the Petition for Rehearing.

872 The Petition for Rehearing was filed on April 25, 1941 and was denied in a written Opinion and Order dated May 20, 1941. The present Petition for Stay was filed on May 21, 1941 and an Opposition thereto was filed by Matheson Radio Company, Inc. on May 28, 1941.

In the instant Petition for Stay, petitioner likewise requests that pending the determination of the appeal, the Commission stay the amendment of sub-sections (a) and (b) of Section 325 of its Rules and Regulations and the issuance of a construction permit to WHDH under its order of April 7, 1941. In support of its request, petitioner incorporates by reference the representations and averments contained in its Petition for Rehearing. These were dis-

cussed by the Commission and found to be without merit in its Opinion of May 20, 1941.

Petitioner apparently assumes that petitions for stay issue automatically, for in neither of the Petitions for Stay nor in the Petition for Rehearing are there any facts which show irremediable injury to itself or the public if the action of April 7, 1941 is not stayed. Such an assumption flies in the teeth of Section 405 of the Communications Act which provides that no request for rehearing shall "operate in any manner to stay or postpone the enforcement thereof, (i. e. an order of the Commission) without the special order of the Commission." When this section is considered in the light of the general policy of the Act to provide for the fullest utilization of radio frequencies in the public interest, it is clear that there must be a compelling reason for delaying the effective date of new or additional service.

Petitioner's repeated failures to show how the public will be injured unless the Commission's action is stayed is significant in view of the fact that the Commission found that the grant of the WHDH application would without measurably affecting petitioner's service enable WHDH to serve 621,000 more people within its primary service area, would improve and extend the service rendered by WHDH to the fishing banks off the New England coast, and would permit WHDH to operate approximately 2½ hours more in the summer and about 5½ hours more in the winter than at present. These findings have never been challenged by petitioner nor has it shown wherein public interest would be served by a further delay in the effectuation of this increased service. We find that public interest would be served by going forward without further delay with the extension and improvement of radio broadcast service to the listening public as proposed in the Matheson application.

In further support of its request for a stay, petitioner urges the Commission to grant it "for the same reasons which impelled it upon its own motion to find, on April 22, 1941, that public interest, convenience and necessity would

be served by suspending its order of April 7, 1941, pending the filing of Petitioner's Petition for Rehearing and
873 the Commission decision thereon." The issuance of a stay on the Commission's own motion was motivated by a desire on the part of the Commission to withhold final action on such an important matter until after petitioner had fully exercised its administrative opportunities to show wherein public interest, convenience or necessity would not be served by a grant of the Matheson application. Although, as we have heretofore indicated, petitioner's previous petition for stay suggested no reason why the public would be benefitted by a stay, the importance of the questions involved combined with the possibility that petitioner might make such a showing in its petition for rehearing appeared to justify a stay pending the filing of, and decision on, such petition. Petitioner failed to make such a showing as the Commission pointed out in its decision of May 20, 1941, on the Petition for Rehearing.

The considerations, therefore, which impelled the Commission to act on its own motion are no longer applicable. The Commission has determined to re-affirm its decision granting the WHDH application and amending Section 3.25 of its Rules and Regulations. Petitioner has not shown either wherein that determination is in error or why public interest would be served by a further stay of the Commission's action. On the contrary, the Commission has found that it would be against the public interest to order a further stay of its action which makes possible an extensive increase in WHDH's coverage without any measurable effect on that of petitioner's station.

Accordingly, it is ordered this 12th day of June, 1941 that the Petition for Stay During Appeal filed by National Broadcasting Company, Inc. (KOA) be and it is hereby, denied.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

874 Fly, Chairman, specially concurring:

For the reasons stated above and particularly since there is no real injury to Station KOA, and since Station WHDH moves forward with knowledge of any legal risks involved, I concur in the foregoing decision denying the stay. The Commission heretofore has arrived at a final decision upon the merits of this case, in which I did not participate, and I do not want by expressing any opinion on a procedural matter to be understood as expressing an opinion on the merits of the decision. At the same time I entertain no doubt as to its legality.

Great waste results from the fact that clear channel stations whose *raison d'etre* is to serve over great distances and in vast rural areas of the country, have to a great extent been concentrated along the coasts and the borders of the country. The power is impacted into the lucrative markets of large metropolitan areas which are already fully served, if, in fact, not over served, while a great portion of the signal strength of the clear channel station is wasted upon the sea. Thus, while listeners in New York, Chicago and Los Angeles may tune in on a dozen stations, there are vast rural regions in upper New England, in some areas of the South, and in the great trans-Mississippi area where the listening public has difficulty in receiving programs of even one station. The need for a studious, careful appraisal of this vital problem is apparent. If the clear channel wave lengths are to be further exploited, the plans for that exploitation ought to be made in the light of these dominant factors and as a result of a full study.

PROOF OF SERVICE.

Service of the foregoing Brief and Appendix for Appellant and receipt of a true and correct copy is hereby acknowledged this 15th day of September, 1941.

FEDERAL COMMUNICATIONS COMMISSION

By.....

.....

Attorney for Matheson Radio Company, Inc., Intervenor.

.....

Attorney for Berks Broadcasting Company, Intervenor.

IN

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 7933

NATIONAL BROADCASTING COMPANY, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Intervenor-Appellee

and

MATHESON RADIO COMPANY, INC.;
BERKS BROADCASTING COMPANY,
Intervenors

Appeal from the Federal Communications Commission

APPENDIX TO BRIEF FOR INTERVENOR.

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13 *Notice of Intention to Intervene*

Comes now Matheson Radio Company, Inc., a corporation organized and existing under the laws of the State of Massachusetts, and, pursuant to Section 402(d) of the Communications Act of 1934, gives notice of its intention to intervene in the above-entitled proceeding, with the view of urg-

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ing dismissal of the appeal, or affirmance of the decision of the Commission and otherwise to participate fully therein.

Statement of Intervener's Interest

Intervener, Matheson Radio Company, Inc., is interested in the above-entitled proceeding and it would be aggrieved and its interest adversely affected by a reversal of the Federal Communications Commission's decision appealed from herein for the following reasons:

1. Intervener, by the Commission's decision of April 7, 1941, was granted a construction permit authorizing a change in facilities from 1 kilowatt power and hours of operation to sunset in Denver on the frequency 850 kilocycles to operation with 5 kilowatts power, unlimited time, on the frequency 850 kilocycles.

2. A reversal of said decision of the Commission, as requested by the appellant, National Broadcasting Company, Inc., would deprive intervener of the increased operating facilities aforesaid with consequent impairment of the service to the public so authorized, would subject intervener to great losses because of the expense incurred in prosecuting its application before the Commission, would deprive intervener of the advertising revenue resulting from
14 such operation, and would deprive intervener of the privilege and opportunity of engaging in radio broadcasting as authorized by its permit.

MATHESON RADIO CORPORATION, INC.,

By ANDREW G. HALEY
1101 Earle Building
Washington, D. C.

W. THEODORE PIERSON
204 Munsey Building
Washington, D. C.

Its Attorneys

FCC Form No. 304
(Revised August 28, 1940)

RECEIVED
OCT 23 11 2 39

Exhibit A
to Form No. 304

Resubmitted

File No. B1-P-2201

Call letters WHDH

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR REGULAR BROADCAST STATION CONSTRUCTION PERMIT OR MODIFICATION THEREOF

(Submit, in duplicate, to Federal Communications Commission, Washington, D. C. Swear to one copy)

See rules governing the service in which authorization is sought before executing application

To the Federal Communications Commission:

1. Name of applicant * Matheson Radio Co., Inc.
2. Post-office address: State Massachusetts City Boston
   Street and number 62 Boylston Street
3. Is this application made for—
   (a) Authorization to construct new radio station? No
   (b) Authorization to change present location of transmitter of existing station? No
      (1) What is distance in miles between present location and proposed location of transmitter? -
   (c) Authorization to change maximum rated carrier power, which necessitates installation of new equipment? Yes
      (1) Applicant represents that present maximum rated carrier power is 1,000 watts.
      (2) Applicant represents that proposed maximum rated carrier power is 5,000 watts.
   (d) Authorization to install new equipment? Yes
      (1) Indicate what new equipment is to be installed (check):
         (a) New transmitter Yes (b) Change in system of modulation No
         (c) Change in type or number of vacuum tubes in last radio stage Yes
         (d) Other changes (specify): Directional antenna
4. What is applicant's principal business? Radio broadcasting
   (a) What other business or businesses is applicant directly or indirectly interested in; explain fully? None

   (b) If applicant is a corporation, give the names and addresses of the officers, directors, and principal stockholders and state specifically what other business or businesses each of these parties is directly or indirectly interested in; explain fully? (Attach additional sheets if necessary.) John J. Matheson, President, 282 Washington St., Gloucester, Mass. Ralph G. Matheson, Treasurer, 75 Greaton Rd., West Roxbury, Mass. Martin Hanley, 225 Corey St., West Roxbury, Mass.

   (2) The number of members
   (3) Whether any members are aliens
   (4) The name, nationality, and position of each alien

12. (a) Is applicant directly or indirectly, through stock ownership, contract, or otherwise, interested in the ownership or control of any other radio broadcasting stations? No
    If so, state call letters and location of such stations
    (b) Has the applicant in the past been directly or indirectly interested in the ownership or control of any radio broadcasting stations? Yes
    If so, state call letters and location of such stations WEPS transferred by voluntary assignment of license to Worcester, Mass.
13. (a) State applicant's relation to station (whether applicant is to be owner or lessee, and, if neither owner nor lessee, state nature of applicant's interest in use and control of station) Owner
    (If not owner, a copy of agreement showing applicant's interest in station must be attached if not heretofore filed with the Commission)
    (b) If applicant is not to be owner of station, who is?
    (c) Will applicant have absolute control of station, both as to physical operation and program broadcast? Yes
    If not, attach copy of any contract which may in any way affect applicant's right to do so.
14. Attach detailed financial statement showing applicant's assets and liabilities and state fully the facts showing applicant's financial responsibility with respect to the construction and operation of station. Exhibit A, hereto attached.
15. (a) Has the applicant been finally adjudged guilty by any Federal court of unlawful monopolizing, or attempting unlawfully to monopolize, radio communication directly or indirectly through control of manufacture or sale of radio apparatus, exclusive traffic arrangements, or any other means, or of unfair methods of competition? No
    (b) Is applicant directly or indirectly controlled by any party finally adjudged guilty as above stated? No
    (Answer yes or no)
16. The frequency, power, and hours of operation requested for the proposed station are as follows:
    (a) Frequency 850 kilocycles.
    (b) Power (night) 5,000 watts. (c) Power (day) 5,000 watts.
    (d) Hours of operation:
       (1) Unlimited Yes (2) Daytime only (3) Limited
       (4) Sharing with (specify stations) None
       (5) Other (specify) None
    (e) State number of hours per day proposed station will operate 18 hours

16-941

See rules governing the service in which authorization is sought.

To the Federal Communications Commission:

1. Name of applicant * Matheson Radio Co., Inc.
2. Post-office address: State Massachusetts City Boston
   Street and number 62 Boylston Street
3. Is this application made for—
   (a) Authorization to construct new radio station? No
   (b) Authorization to change present location of transmitter of existing station? No
      (1) What is distance in miles between present location and proposed location of transmitter? -
   (c) Authorization to change maximum rated carrier power, which necessitates installation of new equipment? Yes
      (1) Applicant represents that present maximum rated carrier power is 1,000 watts.
      (2) Applicant represents that proposed maximum rated carrier power is 5,000 watts.
   (d) Authorization to install new equipment? Yes
      (1) Indicate what new equipment is to be installed (check):
         (a) New transmitter Yes (b) Change in system of modulation No
         (c) Change in type or number of vacuum tubes in last radio stage Yes
         (d) Other changes (specify): Directional antenna
4. What is applicant's principal business? Radio broadcasting
   (a) What other business or businesses is applicant directly or indirectly interested in; explain fully? None
   (b) If applicant is a corporation, give the names and addresses of the officers, directors, and principal stockholders and state specifically what other business or businesses each of these parties is directly or indirectly interested in; explain fully? (Attach additional sheets if necessary.) John J. Matheson, President, 282 Washington St., Gloucester, Mass. Ralph G. Matheson, Treasurer, 75 Creaton Rd., West Roxbury, Mass. Martin Hanley, 225 Corey St., West Roxbury, Mass. All of the above are directors, and the only one in any other business is Mr. Hanley who is in the oil business.
5. Is applicant a citizen of the United States? Corporation
   If so, state whether by birth or naturalization
6. Is the applicant a representative of an alien or foreign government? No

* If a corporation, state corporate name; if a partnership, state names of all partners and the name under which the partnership does business; if an unincorporated association, state the name of an executive officer, the office held by him, and the name of the association. The same name or names should be signed in the place provided at the end of application, except that in the case of a partnership, the application may be signed in the name of the partnership by one of the partners.

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3 97

7. State whether applicant is a corporation, partnership, or association Corporation

8. If applicant is a corporation—

(a) Under laws of what State or country is it organized? Massachusetts

(A copy of the articles of incorporation properly certified by the Secretary of State shall be attached if not heretofore filed with the Commission.)

(b) Is more than one-fifth of capital stock owned of record or may it be voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country? No

(c) Is any director or officer an alien? No If so, state name, citizenship, and position of each

(d) Give names, addresses, and citizenship of (1) incorporators, (2) directors, (3) officers and (4) stockholders; the offices held by each officer and the number and kind of shares and percentage of issued stock held by each stockholder. (If this information in complete form is now on file and there is no change, reference thereto may be made.)

INCORPORATORS

Name	*Address*	*Citizenship*
Complete information now on file with the Federal Communications Commission. No change since last filing.		

DIRECTORS

Name	*Address*	*Citizenship*
John J. Matheson	282 Washington St.,	Gloucester, Mass.
Ralph G. Matheson	75 Greaton Rd.,	West Roxbury, Mass.
Martin Hanley	225 Corey St.,	West Roxbury, Mass.
All are citizens		

OFFICERS

Name	*Address*	*Office*	*Citizenship*
John J. Matheson	282 Washington St. Gloucester, Mass	President	U. S.
Ralph G. Matheson	75 Greaton Rd., West Roxbury, Mass	Treasurer	U. S.

STOCKHOLDERS

(Use additional sheets if necessary)

Name	*Address*	*Citizenship*	*Number of shares and percentage of issued stock held*
Complete information is on file with Federal Communications Commission.			

(e) Is stock to be sold after this permit is issued for purpose of raising money to construct and/or operate the proposed station? No

If applicant is a corporation is applicant directly or indirectly controlled by any other corporation?

COMPLETE DATA ON FILE

type of tubes On file

Normal plate current, per tube On file Plate voltage On file

(c) List buffer and intermediate power amplifier stages, by number and type of tubes in each stage On file

(d) Last radio stage: Number, manufacturer's name, and type of tubes On file Normal night operation for power requested: Plate current, per tube On file Plate voltage On file

If greater day power than night power is requested, specify the following:

Normal day operation: Plate current, per tube On file Plate voltage On file

Describe fully the proposed method and procedure of reducing power at sunset On file

(e) Modulator or last audio stage: Number, manufacturer's name, and type of tubes and how operated (Class "A", "A Prime", or "B") On file

Normal plate current, per tube On file Plate voltage On file

(f) Which radio stage is modulated? On file

(g) What system of modulation is employed (high level, low level, grid bias in last radio stage, etc.)? On file

(h) If low-level modulation is employed, give for modulated radio stage: Number and type of tubes On file Plate current, per tube On file Plate voltage On file

(i) The transmitter is designed for what maximum percentage of satisfactory modulation?

(j) State name and type number of modulation monitor General Radio Type 731-A

(k) Give Federal Communications Commission approval number 1551

(l) Specify manufacturer's name, type, number, and full scale reading of the following meters:

(1) In last radio stage:

Plate voltmeter

Plate ammeter On file

(2) Antenna ammeter

(m) Describe the plate power supply for last stage On file

Rating: Current On file Voltage On file

(n) Maximum carrier power output of transmitter for satisfactory operation is 5,000 watts.

(o) Maximum rated carrier power of transmitter as determined by orders of the Federal Communications Commission is 5,000 watts

18. Description of automatic frequency control equipment:

(a) Make Western Electric Type No. On file

(b) If composite, give manufacturer's name, type of cut, and temperature coefficient in cycles per degree centigrade of the quartz crystal On file

(c) By whom will unit be calibrated? On file

Calibrated frequency. 850 kilocycles at — degrees centigrade.

Proposed operating frequency: 850 kilocycles. (Give exact figure, correct to third decimal place at on file degrees centigrade.

(d) State guaranteed accuracy of the calibration: On file cycles.

and (4) stockholders; the offices held by each officer and the number and kind of share and percentage of issued stock held by each stockholder. (If this information in complete form is now on file and there is no change, reference thereto may be made.)

INCORPORATORS

Name	*Address*	*Citizenship*
Complete information now on file with the Federal Communications Commission. No change since last filing.		

DIRECTORS

Name	*Address*	*Citizenship*
John J. Matheson	282 Washington St.,	Gloucester, Mass.
Ralph G. Matheson	75 Greaton Rd.,	West Roxbury, Mass.
Martin Hanley	225 Corey St.,	West Roxbury, Mass.
All are citizens		

OFFICERS

Name	*Address*	*Office*	*Citizenship*
John J. Matheson	282 Washington St. Gloucester, Mass	President	U. S.
Ralph G. Matheson	75 Greaton Rd., West Roxbury, Mass	Treasurer	U. S.

STOCKHOLDERS

(Use additional sheets if necessary)

Name	*Address*	*Citizenship*	*Number of shares and percentage of issued stock held*
Complete information is on file with Federal Communications Commission.			

(e) Is stock to be sold after this permit is issued for purpose of raising money to construct and/or operate the proposed station? No

9. If applicant is a corporation, is applicant directly or indirectly controlled by any other corporation? No

(a) If so, give name and address of such controlling corporation

(*b*) Under laws of what State or country is such corporation organized? _____

(A copy of the articles of incorporation properly certified by the Secretary of State shall be attached if not heretofore filed with the Commission.)

(*c*) Is more than one-fourth of capital stock of such corporation owned of record or may it be voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country? _____

(*d*) Is any director or officer of such corporation an alien? _____ If so, state name, citizenship, and position of each _____

(*e*) Give names, addresses, and citizenship of (1) incorporators, (2) directors, (3) officers, and (4) stockholders; the offices held by each officer and the number and kind of shares and percentage of issued stock held by each stockholder. (If this information in complete form is now on file and there is no change, reference thereto may be made.)

INCORPORATORS

Name	*Address*	*Citizenship*

DIRECTORS

Name	*Address*	*Citizenship*

OFFICERS

Name	*Address*	*Office*	*Citizenship*

STOCKHOLDERS

(Use additional sheets if necessary)

Name	*Address*	*Citizenship*	*Number of shares and percentage of issued stock held*

(*f*) Is the above-described controlling corporation in turn a subsidiary? _____

If so, attach additional sheets answering question 9 (*a*) to (*e*), inclusive, for each com-

COMPLETE DATA ON FILE W

(*k*) State manufacturer's name and rated accuracy of: Thermostat On file

Thermometer On file

(*l*) Attach the circuit diagram of automatic temperature control system if not already on file with the Commission. On file

(*m*) Attach a sketch or drawing of the automatic temperature control chamber, if not already on file with the Commission. On file

(*n*) Describe checking means used for determining if transmitter retains assigned frequency Periodic check from approved frequency measuring service

(*o*) State name and type number of separate frequency monitor Western Electric 1A

(*p*) Give Federal Communications Commission approval number 1455

19. Applicant represents (1) that there is attached or (2) that there has been heretofore filed with the Commission, an accurate schematic diagram of the fundamental radio and audio circuits of the transmitter proposed, including antenna and ground or counterpoise connections, antenna feed system, and that it indicates the type of tubes.

(This should be a blueprint or ink drawing, and, if possible, the size of this application, and attached hereto.)

20. (*a*) Type of antenna Directive

(*b*) Height of vertical lead 271 feet.

(*c*) Length of flat top (if any) None feet.

(*d*) Give maximum height (in feet) of towers above ground level 280

(*e*) Will towers be painted and marked with signal lights to conform with specifications of Department of Commerce (see Aeronautics Bulletin No. 474)? Yes

(*f*) If not fully described above, give complete details See attached Directive antenna design data

(*g*) Counterpoise (if used)—type and dimensions None

(*h*) Antenna ground (if used)—how obtained? Buried radials

21. Cost of proposed station: Transmitter, $50,000 Studio, $ - Other items (state nature) $10,000 Directive Antenna

22. Proposed location of transmitter: State Massachusetts County Essex

City or town Saugus Street and number 250 Salem Turnpike

North latitude: Degrees 42, minutes 28, seconds 15

West longitude: Degrees 70, minutes 59, seconds 40

23. Number of persons residing within various distances of proposed location of transmitter is as follows: 0.4 mile 0, 1 mile 200, 2 miles 2,500 3 miles 60,000 5 miles 710,000 miles 1,561,000

24. (*a*) Number of broadcasting stations (by call letters) located within various distances of proposed location of transmitter is as follows:

1 mile None, 2 miles None

3 miles WEEI, 8 miles WBZ WBZA

(*b*) Number of nonbroadcasting (commercial or Government) RECEIVING stations located within various distances of proposed location of transmitter is as follows:

1 mile None, 2 miles None, 3 miles None

25. (*a*) Name and give location of all AIRPORTS within 10 miles of proposed location of transmitter

East Boston Airport - East Boston, Mass.

Naval Reserve and Dennison Fields - Squantum, Mass.

Muller Field - Revere, Mass. (6)

8 102

and percentage of issued stock held by each stockholder. (If this information in complete form is now on file and there is no change, reference thereto may be made.)

INCORPORATORS

Name	*Address*	*Citizenship*

DIRECTORS

Name	*Address*	*Citizenship*

OFFICERS

Name	*Address*	*Office*	*Citizenship*

STOCKHOLDERS

(Use additional sheets if necessary)

Name	*Address*	*Citizenship*	*Number of shares and percentage of issued stock held*

(*f*) Is the above-described controlling corporation in turn a subsidiary? _____ If so, attach additional sheets answering question 9 (*a*) to (*e*), inclusive, for each company to and including the organization having final control.

10. If application is made in behalf of a copartnership, there must be submitted a certified copy of the articles of copartnership. (If articles have heretofore been filed with the Commission, reference thereto may be made.) _____

11. If application is made in behalf of an unincorporated association, there must be submitted a certified copy of the articles of association and bylaws (unless heretofore filed with the Commission), showing the purpose of the association _____

Applicant must also show—

(1) The names, addresses, and citizenship of the officers and the offices held by each _____

(2) The number of members _____

(3) Whether any members are aliens _____

(4) The name, nationality, and position of each alien _____

12. (*a*) Is applicant directly or indirectly, through stock ownership, contract, or otherwise, interested in the ownership or control of any other radio broadcasting stations? No

If so, state call letters and location of such stations _____

(*b*) Has the applicant in the past been directly or indirectly interested in the ownership or control of any radio broadcasting stations? Yes

If so, state call letters and location of such stations WKPS transferred by voluntary assignment of license to Worcester, Mass.

13. (*a*) State applicant's relation to station (whether applicant is to be owner or lessee, and, if neither owner nor lessee, state nature of applicant's interest in use and control of station) Owner

(If not owner, a copy of agreement showing applicant's interest in station must be attached if not heretofore filed with the Commission)

(*b*) If applicant is not to be owner of station, who is? _____

(*c*) Will applicant have absolute control of station, both as to physical operation and program broadcast? Yes

If not, attach copy of any contract which may in any way affect applicant's right to do so.

14. Attach detailed financial statement showing applicant's assets and liabilities and state fully the facts showing applicant's financial responsibility with respect to the construction and operation of station Exhibit A, hereto attached.

15. (*a*) Has the applicant been finally adjudged guilty by any Federal court of unlawful monopolizing, or attempting unlawfully to monopolize, radio communication directly or indirectly through control of manufacture or sale of radio apparatus, exclusive traffic arrangements, or any other means, or of unfair methods of competition? No

(*b*) Is applicant directly or indirectly controlled by any party finally adjudged guilty as above stated? No

(Answer yes or no)

16. The frequency, power, and hours of operation requested for the proposed station are as follows:

(*a*) Frequency 850 kilocycles.

(*b*) Power (night) 5,000 watts. (*c*) Power (day) 5,000 watts.

(*d*) Hours of operation:

(f) Does applicant request the assignment of all or any part of the facilities (i. e., frequency, power, and/or hours of operation) now assigned to any other station or stations? No
(Answer yes or no)

If so, specify the station or stations and state accurately the facilities requested to be withdrawn therefrom None

17. Description of transmitting apparatus proposed to be installed—

(a) Make Western Electric Type no. 405-A1

(b) Oscillator: Type of circuit On file Number, manufacturer's name, and type of tubes On file

Normal plate current, per tube On file Plate voltage On file

(c) List buffer and intermediate power amplifier stages, by number and type of tubes in each stage On file

(d) Last radio stage: Number, manufacturer's name, and type of tubes On file Normal night operation for power requested: Plate current, per tube On file Plate voltage On file

If greater day power than night power is requested, specify the following:

Normal day operation: Plate current, per tube On file Plate voltage On file

Describe fully the proposed method and procedure of reducing power at sunset On file

(e) Modulator or last audio stage: Number, manufacturer's name, and type of tubes and how operated (Class "A", "A Prime", or "B") On file

Normal plate current, per tube On file Plate voltage On file

(f) Which radio stage is modulated? On file

(g) What system of modulation is employed (high level, low level, grid bias in last radio stage, etc.)? On file

(h) If low-level modulation is employed, give for modulated radio stage: Number and type of tubes On file Plate current, per tube On file Plate voltage On file

(i) The transmitter is designed for what maximum percentage of satisfactory modulation?

(j) State name and type number of modulation monitor General Radio Type 731-A

(k) Give Federal Communications Commission approval number 1551

(l) Specify manufacturer's name, type, number, and full scale reading of the following meters:

(1) In last radio stage:

Plate voltmeter

Plate ammeter On file

(2) Antenna ammeter

(m) Describe the plate power supply for last stage On file

Rating: Current On file Voltage On file

(n) Maximum carrier power output of transmitter for satisfactory operation is 5,000 watts.

(o) Maximum rated carrier power of transmitter as determined by orders of the Federal Communications Commission is 5,000 watts

18. Description of automatic frequency control equipment:

(a) Make Western Electric Type No. On file

(b) If composite, give manufacturer's name, type of cut, and temperature coefficient in cycles per degree centigrade of the quartz crystal On file

(c) By whom will unit be calibrated? On file

Calibrated frequency. 850 kilocycles at — degrees centigrade.

Proposed operating frequency: 850 kilocycles. (Give exact figure, correct to

COMPLETE DATA ON FILE

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COMPLETE DATA ON FILE WITH FCC

(e) State number of frequency control oscillators which will be maintained constantly at correct operating temperature and frequency in heat-controlled chambers On file

(f) Is provision made for instantaneous connection of spare frequency control units? On file

(g) Manufacturer's name and type of automatic temperature control: On file

(h) State within what limit automatic temperature control will hold the temperature: _____ degrees centigrade.

(i) State temperature coefficient of the frequency control units: On file cycles per degree centigrade.

(j) Is temperature coefficient positive or negative? On file

(k) State manufacturer's name and rated accuracy of: Thermostat On file
Thermometer On file

(l) Attach the circuit diagram of automatic temperature control system if not already on file with the Commission. On file

(m) Attach a sketch or drawing of the automatic temperature control chamber, if not already on file with the Commission. On file

(n) Describe checking means used for determining if transmitter retains assigned frequency Periodic check from approved frequency measuring service

(o) State name and type number of separate frequency monitor Western Electric 1A

(p) Give Federal Communications Commission approval number 1455

19. Applicant represents (1) that there is attached or (2) that there has been heretofore filed with the Commission, an accurate schematic diagram of the fundamental radio and audio circuits of the transmitter proposed, including antenna and ground or counterpoise connections, antenna feed system, and that it indicates the type of tubes.
(This should be a blueprint or ink drawing, and, if possible, the size of this application, and attached hereto.)

20. (a) Type of antenna Directive
(b) Height of vertical lead 271 feet.
(c) Length of flat top (if any) None feet.
(d) Give maximum height (in feet) of towers above ground level 280
(e) Will towers be painted and marked with signal lights to conform with specifications of Department of Commerce (see Aeronautics Bulletin No. 474)? Yes
(f) If not fully described above, give complete details See attached Directive antenna design data
(g) Counterpoise (if used)—type and dimensions None
(h) Antenna ground (if used)—how obtained? Buried radials

21. Cost of proposed station: Transmitter, $30,000 Studio, $ - Other items (state nature) $10,000 Directive Antenna

22. Proposed location of transmitter: State Massachusetts County Essex
City or town Saugus, Street and number 250 Salem Turnpike
North latitude: Degrees 42, minutes 28, seconds 15
West longitude: Degrees 70, minutes 59, seconds 40

23. Number of persons residing within various distances of proposed location of transmitter is as follows: 0.4 mile 0, 1 mile 200, 2 miles 2,500 3 miles 60,000 5 miles 710,000 miles 1,561,000

24. (a) Number of broadcasting stations (by call letters) located within various distances of proposed location of transmitter is as follows:
1 mile None, 2 miles None
3 miles WEEI, 8 miles WBZ WBZA

(b) Number of nonbroadcasting (commercial or Government) RECEIVING stations located within various distances of propposed location of transmitter is as follows:
1 mile None, 2 miles None, 3 miles None

25. (a) Number of miles of all AIRPORTS within 10 miles of proposed location of transmitter

(b) Give distance from proposed location of transmitter to each of such airports
East Boston Airport - 5.75 miles
Squantum Airports - 9.5 "
Miller Field - 1.75 "

(c) Name and give distance to any established AIRWAYS within 10 miles of proposed location of transmitter Boston-Portland Airway - 2 miles

(d) If application is for new station or change of location of existing station, attach map showing present location, proposed location, character of surrounding area (retail or wholesale business, manufacturing, residential, or unpopulated, the heights of all tall buildings, if any, in the vicinity of the antenna indicating the distance and direction thereof from the proposed site; also, density of population, type of soil and terrain) and the location of airports, airways, and other radio stations, including receiving stations, except broadcast or amateur.

26. Proposed location of main studio: State Massachusetts County Suffolk
City or town Boston Street and number 62 Boylston Street
Other studios maintained by station None

27. Average percentage of time expected to be devoted monthly to following services:

	Commercial Programs		Sustaining Programs (Gen'l)
(1)	Entertainment	20.15	20.91
(2)	Educational	2.21	1.98
(3)	Religious	2.21	1.40
(4)	Agricultural	.01	.82
(5)	Fraternal		.21
(6)	Fishermen	.08	7.
(7)			Non-duplicatable entertainment 55.06
(8)			News 8%

28. (a) Does applicant expect to obtain programs from what is known as a "chain"? No
(b) Name of chain or chains
(c) What will be the percentage of total time proposed to be used for chain programs (i. e., programs, both paid and sustaining, which are duplicated by any other station)?
(d) What will be the percentage of total time proposed to be used for mechanical reproduction (i. e., phonograph records, electrical transcriptions, player piano, etc.)? 25%

29. (a) State the objects to be attained by the construction, or changes in construction, for which application is made To allow full time operation to WHDH; to render increased service to Boston and Massachusetts Bay area and with increased power enlarge the range of the good service area and increase the intensity of signal in the Boston metropolitan area to meet higher standards of reception.

(b) State definitely what service will be rendered by the proposed station which is not now available to the community which it expects to serve Improve general broadcasting service of station; provide a complete day and night service for fishermen at sea, also a complete local independent program broadcast by no other station.

30. If for special broadcast on a frequency of 1530, 1550, or 1570 kilocycles, supply fully the following:

(a) Outline the program of research and experiment calculated to contribute to the development and practical application of high fidelity broadcasting No

present location, proposed location, character of surrounding area (retail or wholesale business, manufacturing, residential, or unpopulated, the heights of all tall buildings, if any, in the vicinity of the antenna indicating the distance and direction thereof from the proposed site; also, density of population, type of soil and terrain) and the location of airports, airways, and other radio stations, including receiving stations, except broadcast or amateur.

26. Proposed location of main studio: State Massachusetts County Suffolk
City or town Boston Street and number 62 Boylston Street
Other studios maintained by station None

27. Average percentage of time expected to be devoted monthly to following services:

Commercial Programs		Sustaining Programs	
(1) Entertainment	20.15	(1) Entertainment (Gen'l)	20.91
(2) Educational	2.21	(2) Educational	1.98
(3) Religious	2.21	(3) Religious	1.40
(4) Agricultural	.01	(4) Agricultural	.82
(5) Fraternal		(5) Fraternal	.21
(6) Fishermen	.08	(6) Fishermen	7.
(7)		(7) Non-duplicatable entertainment	35.06
		(8) News 8%	

28. (a) Does applicant expect to obtain programs from what is known as a "chain"? No
(b) Name of chain or chains
(c) What will be the percentage of total time proposed to be used for chain programs (i. e., programs, both paid and sustaining, which are duplicated by any other station)?
(d) What will be the percentage of total time proposed to be used for mechanical reproduction (i. e., phonograph records, electrical transcriptions, player piano, etc.)? 23%

29. (a) State the objects to be attained by the construction, or changes in construction, for which application is made To allow full time operation to WHDH; to render increased service to Boston and Massachusetts Bay area and with increased power enlarge the range of the good service area and increase the intensity of signal in the Boston metropolitan area to meet higher standards of reception.
(b) State definitely what service will be rendered by the proposed station which is not now available to the community which it expects to serve Improve general broadcasting service of station; provide a complete day and night service for fishermen at sea, also a complete local independent program broadcast by no other station.

30. If for special broadcast on a frequency of 1530, 1550, or 1570 kilocycles, supply fully the following:
(a) Outline the program of research and experiment calculated to contribute to the development and practical application of high fidelity broadcasting No
(b) Qualifications of engineers supervising research and taking observations No

(c) Description of equipment for taking observations No

(d) Plans for listeners' cooperation and analysis of response No

(e) Results expected and detailed bases therefor No

(f) Any other pertinent information No

31. If the construction permit is granted, the construction will be commenced within 30 days of the granting thereof and will be completed and the station ready for operation within 90 days thereafter.

32. The applicant waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a construction permit in accordance with this application.

Dated this 27th day of July, 19 38

Matheson Radio Co., Inc.
(Must correspond with item 1) Applicant.

By R. G. Matheson Treasurer

Treasurer
Official.

(BE SURE ALL NECESSARY INFORMATION IS FURNISHED)

STATE OF Massachusetts
COUNTY OF Suffolk } ss:

RALPH G. MATHESON, being duly {sworn upon his oath, affirmed according to law,

deposes and says that he is the Treasurer
(If applicant is not an individual, state relation of affiant to applicant)

above-named applicant, and that the facts stated in the foregoing application and all exhibits attached thereto are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true.

Ralph G. Matheson
Affiant.

Subscribed and sworn to before me this 27th day of July, 19 38

[SEAL]

Mary Brennahan
Notary Public.

(f) Any other pertinent information No

31. If the construction permit is granted, the construction will be commenced within 30 days of the granting thereof and will be completed and the station ready for operation within 90 days thereafter.

32. The applicant waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a construction permit in accordance with this application.

Dated this 27th day of July, 19 38

Matheson Radio Co., Inc.
(Must correspond with item 1) Applicant.

R G Matheson Treasurer

By

Treasurer
Official

(BE SURE ALL NECESSARY INFORMATION IS FURNISHED)

STATE OF Massachusetts
COUNTY OF Suffolk } ss:

RALPH G. MATHESON, being duly {sworn upon his oath, affirmed according to law,

deposes and says that he is the Treasurer
(If applicant is not an individual, state relation of affiant to applicant)

above-named applicant, and that the facts stated in the foregoing application and all exhibits attached thereto are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true.

Ralph G. Matheson
Affiant.†

Subscribed and sworn to before me this 27th day of July, 19 38

[SEAL]

Mary Brenahan
Notary Public.

(Notary public's seal must be affixed where law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires March 2, 1939

† Must be subscribed and verified by party applicant, by one of the parties if more than one, by an officer if applicant is a corporation, or by attorney of applicant only under the provisions of Rule 105.24 which must be fully explained.

U.S. GOVERNMENT PRINTING OFFICE 16—661

55 September 21, 1938

Matheson Radio Company, Inc.,
62 Boylston Street,
Boston, Massachusetts.

Gentlemen:

Re: Your application File No. B1-P-2201,
Call Letters WHDH.

Receipt is acknowledged of the above application for construction permit which requests authority to install a new transmitter employing directional antenna for nighttime use, increase power from 1 kw to 5 kw, and change hours of operation from daytime to sunset at Denver, Colorado, to unlimited time.

In this connection, it is desired to call to your attention the provisions of Rule 104.7 to the effect that where an applicant has an application pending and undecided, no other inconsistent or conflicting application filed by or on behalf of the same party will be accepted for consideration.

The Commission records show that on June 30, 1936, there was received an application (B1-SA-210) for special experimental authority from Station WHDH, which was amended May 18, 1938, requesting authority to install a new transmitter employing directional antenna for nighttime use, increase power from 1 kw to 5 kw, and change hours of operation from daytime to sunset at Denver, Colorado, to unlimited time for a period of sixty days of the next six months' license period. That application was designated for hearing on July 27, 1938, but no date has been set for the hearing.

In view of the fact that the instant application requests substantially the same authority which is the subject matter of the former application, it is being returned to you under the provisions of the above Rule.

Very truly yours,

T. J. SLOWIE,
Secretary.

12

GMH:cm
cc Mrs. Mabel Willebrandt
Attorney-at-Law
739 Shoreham Bldg., Washington, D. C.

59 November 22, 1938

Matheson Radio Co. Inc.
Radio Station WHDH
Hotel Touraine, 62 Boylston St.
Boston, Massachusetts

Gentlemen:

Re: Application File No. B1-P-2201

The Commission is considering your recent application, resubmitted October 25, 1938, for construction permit to install new equipment and directional antenna system, increase power from 1 kilowatt to 5 kilowatts, and time of operation from daytime only to unlimited time, employing directional antenna system for night operation.

It is noted that the population figures required under Section 3 of the Standards of Good Engineering Practice, for the 250, 25, 5 and 0.5 mv/m contours, have not been submitted. It will be necessary to submit this information for both day and nighttime operation before further action can be taken on your application.

Any amendment or modification should be subscribed and sworn to in the same manner as was the original application.

Very truly yours,

T. J. SLOWIE,
Secretary.

Copies to Page & Davis
Mrs. Willebrandt
Miss Iehl

JAW:ge/b

60 Mabel Walker Willebrandt

D. W. Walker
Wm. Montgomery Smith
Charles B. Jennings

739 Shoreham Building
Washington, D. C.

Cable Address
WILBRANT Washington

Los Angeles Office
745 Title Insurance Building
433 South Spring Street

Washington, D. C.
November 25, 1938

Federal Communications Commission
Washington, D. C.

Attention: Mr. T. J. Slowie Secretary Radio Division
In re: Application—File No. B1-P-2201

Dear Mr. Slowie:

I have before me the carbon of your letter dated November 22, 1938, addressed to Matheson Radio Co., Inc., Radio Station WHDH, Boston, Massachusetts, in which you ask for certain information concerning population figures and you state that these population figures are "required in Section 3 of the Standards of Good Engineering Practice for the 250, 25, 5, and 0.5 mv/m contours."

From an examination of the rules and regulations now in force as promulgated by the Federal Radio Commission, I cannot see where population figures as suggested are required, but since you ask for them we will see that they are compiled and promptly supplied to you.

However, I trust that the few days that it will take to compile and forward this information to you will not be used as further delay in setting the application of WHDH down for hearing as it has been pending already for an extended period of time.

Very truly yours,
MABEL WALKER WILLEBRANDT

MWW:McS

64 Mabel Walker Willebrandt

D. W. Walker
Wm. Montgomery Smith

Cable Address
WILBRANT Washington, D. C.

739 Shoreham Building
Washington, D. C.
December 5, 1938

The Secretary
Federal Communications Commission
Washington, D. C.

Re: Application file No. B1-P-2201
Matheson Radio Co., Inc. Station WHDH

Dear Sir:

In accordance with your request of November 22, 1938, we are submitting herewith, as amendments to the application above referred to, duplicate copies of the population figures for 250, 25, 5 and 0.5 mv/m contours, together with duplicate verifications by Ralph G. Matheson, Treasurer of Matheson Radio Co., Inc.

I trust that this meets the requirements of the Commission.

Yours very truly,

MABEL WALKER WILLEBRANDT
By WM. MONTGOMERY SMITH

148 Before the Federal Communications Commission
Washington, D. C.

Docket No. 5453

In re Application of
MATHESON RADIO COMPANY, INC. (WHDH)
BOSTON, MASSACHUSETTS

For Construction Permit

Order

Upon further consideration of the above-described application,

It Is Ordered, This 10th day of October, 1939, that the hearing upon said application now scheduled for October 18, 1939, Be, And The Same Is Hereby, Continued without date.

By the Commission

T. J. SLOWIE
Secretary.

(Seal)

149 Before the Federal Communications Commission
Washington, D. C.

Docket No. 5453

In re Application of
MATHESON RADIO COMPANY, INC. (WHDH)
BOSTON, MASSACHUSETTS

For Construction Permit

Motion to Vacate Commission Order of October 10, 1939, Indefinitely Continuing Hearing and to Set Date Certain for Hearing

Comes now Matheson Radio Company, Inc., applicant in the above-entitled cause, and moves the Commission to vacate its Order of October 10, 1939, which reads as follows:

"Upon further consideration of the above-described application,

It Is Ordered, This 10th day of October, 1939, that the hearing upon said application now scheduled for October 18, 1939, Be, And The Same Hereby Is, Continued without date.

By the Commission
Secretary"

and to reinstate the hearing on the application herein previously ordered to be held at 10:00 a.m., on October 18, 1939, or to set a date certain for hearing not later than 10:00 a.m., November 17, 1939, and in support hereof shows as follows:

I

Several months after the filing of the instant application and on January 3, 1939, said application was designated for hearing before the Commission, but no hearing date was set.

Eight months later, on July 26, 1939, the Commission entered an Order directing that the hearing commence at 10:00 a.m., on October 10, 1939.

On September 2, 1939, the Commission released the Notice of Hearing which set forth the issues the Commission desired to have determined.

II

Upon being advised of the hearing date the applicant proceeded to prepare its case with the greatest diligence.
150 This preparation was necessarily intensive and required long hours of constant and difficult effort each day. The applicant expended large sums of money in the course of its preparation. Also, at great expense, the applicant engaged in the services of counsel, engineers, an auditor and other experts.

III

On the applicant's request the Commission on September 15, 1939, ordered the taking of depositions of 33 persons. The applicant proceeded to take said depositions at great cost.

On October 6, 1939, on the Commission's own motion the hearing was continued to October 18, 1939.

IV

The applicant is ready to go to hearing on October 18, 1939, and intends to present its witnesses at the time and place shown in the Commission' order of October 6, 1939, directing that the hearing be held on October 18, 1939. At that time WHDH stands ready to show that its operation as proposed will render the type of service expected of Class II stations and will not interfere with the operation of Sta-

tion KOA or any other station, nor with the future operation of any station; that the operation of WHDH will in no way injure anyone, but on the contrary will be in the public interest, convenience, and necessity in all respects; and that any Commission rules relied upon to prevent such specific operation of WHDH are wholly unreasonable and find no authority in the Communications Act of 1934.

The applicant does not object to a continuance for a period of thirty days, namely, until November 17, 1939, as its counsel has advised Commission officials, but it is aggrieved and greatly injured by an indefinite continuance in the face of its intensive preparation and the expenditure of large sums of money pursuant to the Commission successive orders finally setting October 18, 1939, as the hearing date.

The applicant has made its great efforts and has been extremely diligent because of the apparent mutual desire of the Commission and applicant to hear and determine the important and urgent issues involved in this case.

Wherefore, it is requested that the Order of October 10, 1939, be vacated and that the hearing be held on October 18, 1939, as heretofore ordered, or that a date certain for hearing be set not later than November 17, 1939.

MATHESON RADIO COMPANY, INC.

By: ANDREW G. HALEY
W. THEODORE PIERSON
Its Attorneys

160 Federal Communications Commission
Washington, D. C.

October 20, 1939.

Docket No. 5453

In re Application of
MATHESON RADIO COMPANY, INC. (WHDH)
BOSTON, MASSACHUSETTS

For Construction Permit.

Notice

The Commission on October 10, 1939, having on its own motion, continued without date the hearing of the above-entitled application, and on October 17, 1939, having designated the matter to be heard before Commissioner Case, you are hereby notified that the said hearing will be held in the offices of the Commission, Washington, D. C., on December 11, 1939, at 10:00 o'clock a.m., E.S.T.

By direction of Norman S. Case, Commissioner.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

165 Before the Federal Communications Commission
Washington, D. C.

Docket No. 5453

In re Application of
MATHESON RADIO COMPANY, INC. (WHDH)
BOSTON, MASSACHUSETTS

For Construction Permit

Notice

The Commission on November 20, 1939, having designated that Commissioner Case be authorized and empowered to set

the time and place for a hearing on the above-entitled application, you are hereby notified that said hearing, previously designated for December 11, 1939, will be held in the offices of the Commission, Washington, D. C., on January 15, 1940, at 10:00 A.M., E.S.T.

By direction of Norman S. Case, Commissioner, this the 5th day of December, 1939.

FEDERAL COMMUNICATIONS COMMISSION

JOHN B. REYNOLDS,
Acting Secretary.

167 Before the Federal Communications Commission
Washington, D. C.

Docket No. 5453

In re:
MATHESON RADIO COMPANY, INC. (WHDH)
BOSTON, MASSACHUSETTS

Order

Upon the Commission's own motion It Is Ordered that the hearing upon the above entitled application, now scheduled for January 15, 1940, Be, And The Same Is Hereby, Continued to 10 o'clock, A. M., January 29, 1940.

By the Commission,

COMMISSIONER CASE.
T. J. SLOWIE,
Secretary.

Dated this 6th day of January, 1940.

~~Appellant's Ex. 7~~

Intervenor's Ex. 7.

PAGE & DAVIS

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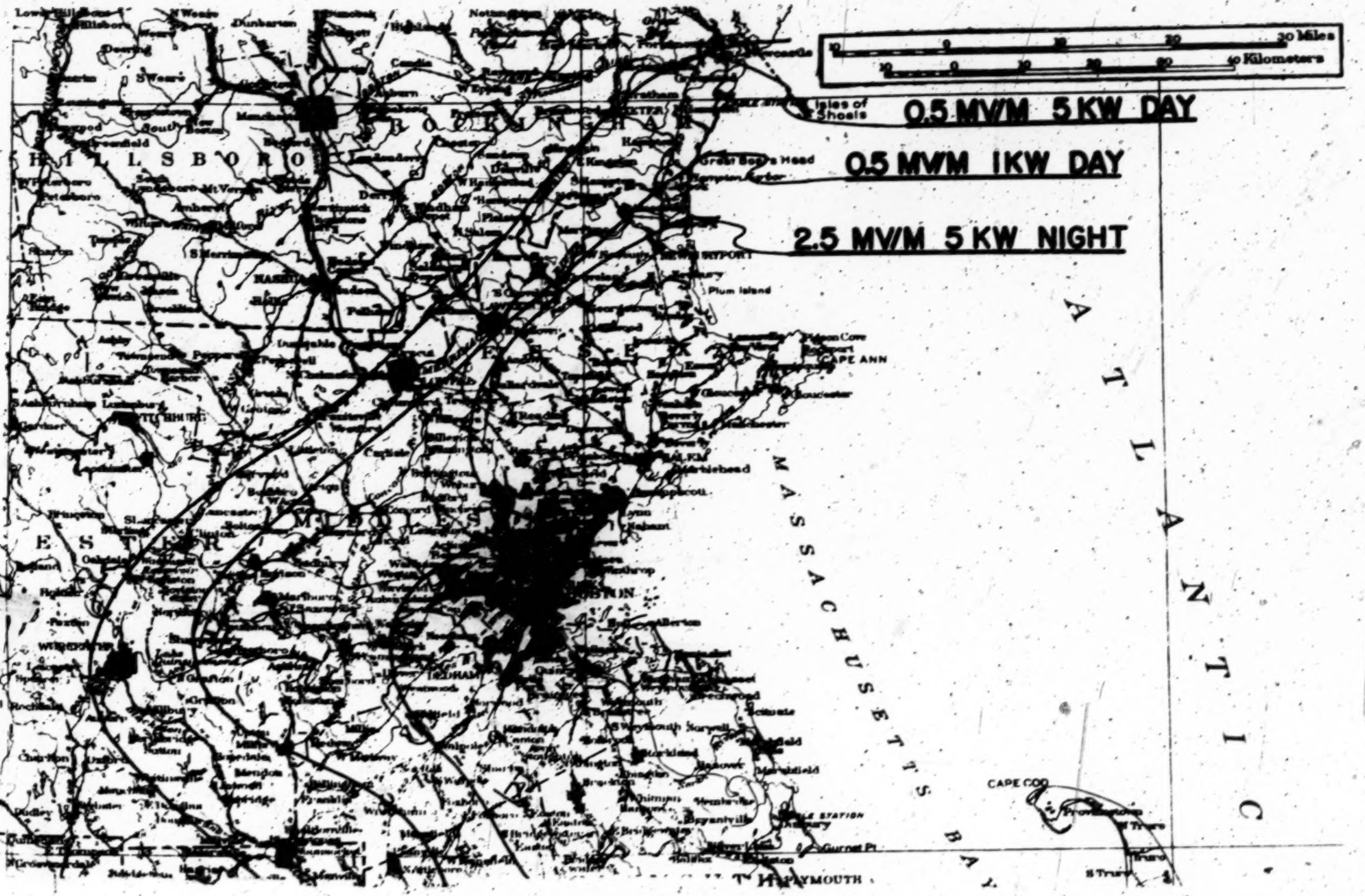
DOCKET SECT.

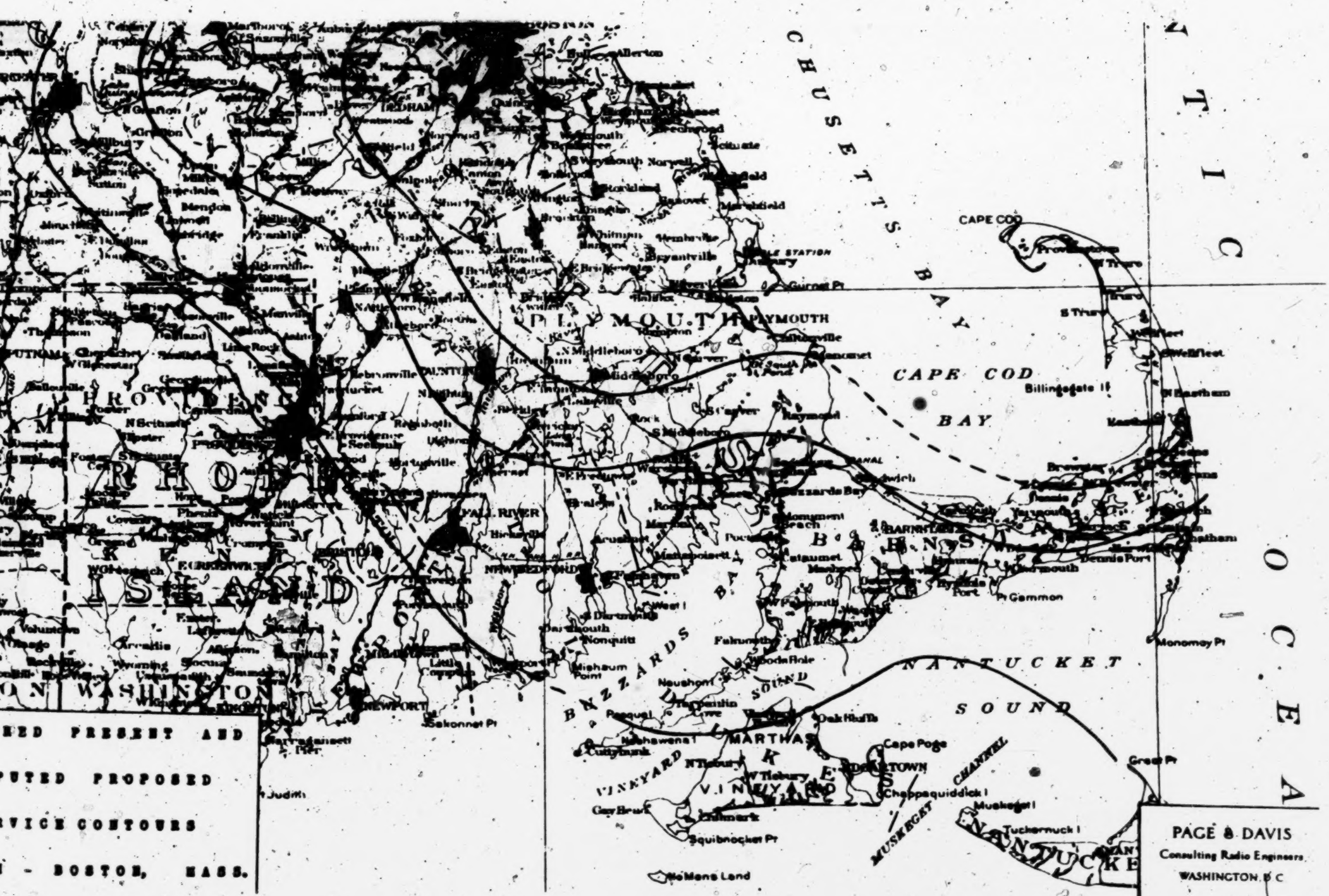
W H D H - ADDITIONAL HOURS OF OPERATION REQUESTED

Month	WHDH present sign-off Denver sunset (Mountain Time)	Time at Boston (E. S. T.)	Additional hours to midnight Boston
January	5:00	7:00	5:00
February	5:30	7:30	4:30
March	6:00	8:00	4:00
April	6:30	8:30	3:30
May	7:00	9:00	3:00
June	7:30	9:30	2:30
July	7:30	9:30	2:30
August	7:00	9:00	3:00
September	6:15	8:15	3:45
October	5:15	7:15	4:45
November	4:45	6:45	5:15
December	4:30	6:30	5:30

DOCKET NO. 5463
WHDH Exhibit 7 (Page 1)
Hearing before Federal Communications
Commission 1-29-40
Electrotyper, Inc., Official Reporter.

Intervenor's Ex. 20.





ED PRESENT AND

UTED PROPOSED

VICE CONTOURS

- BOSTON, MASS.

Intervenor's Ex. 22.

~~PAGE & DAVIS~~

1157-2

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DOCKET SECTION

WHDH POPULATION STUDY

Number of persons residing within various contours

-DAYTIME-

Present 0.5 mv/m contour (1kw).....2,472,000

Proposed 0.5 mv/m contour (5kw).....3,093,000

Proposed 5kw night-time using directive antenna - 2.5 mv/m.....2,285,700

Number within the 2.5 mv/m contour residing within the Boston metropolitan area.....2,185,800

Population of Boston metropolitan area.....2,307,897

94.9% of the population of the Boston metropolitan area will receive interference-free service at night of 2.5 mv/m or more from WHDH as proposed.

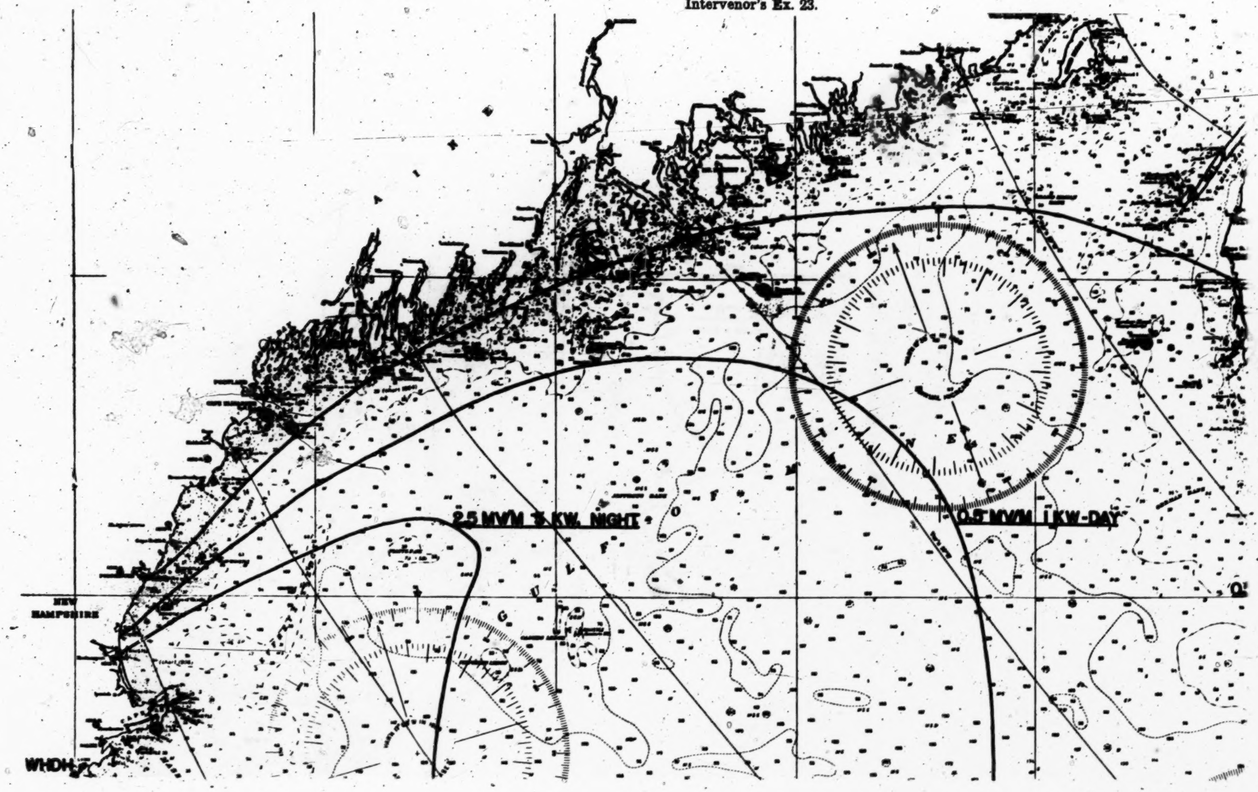
Docket No. 5453

Applicant _____ Exhibit 22

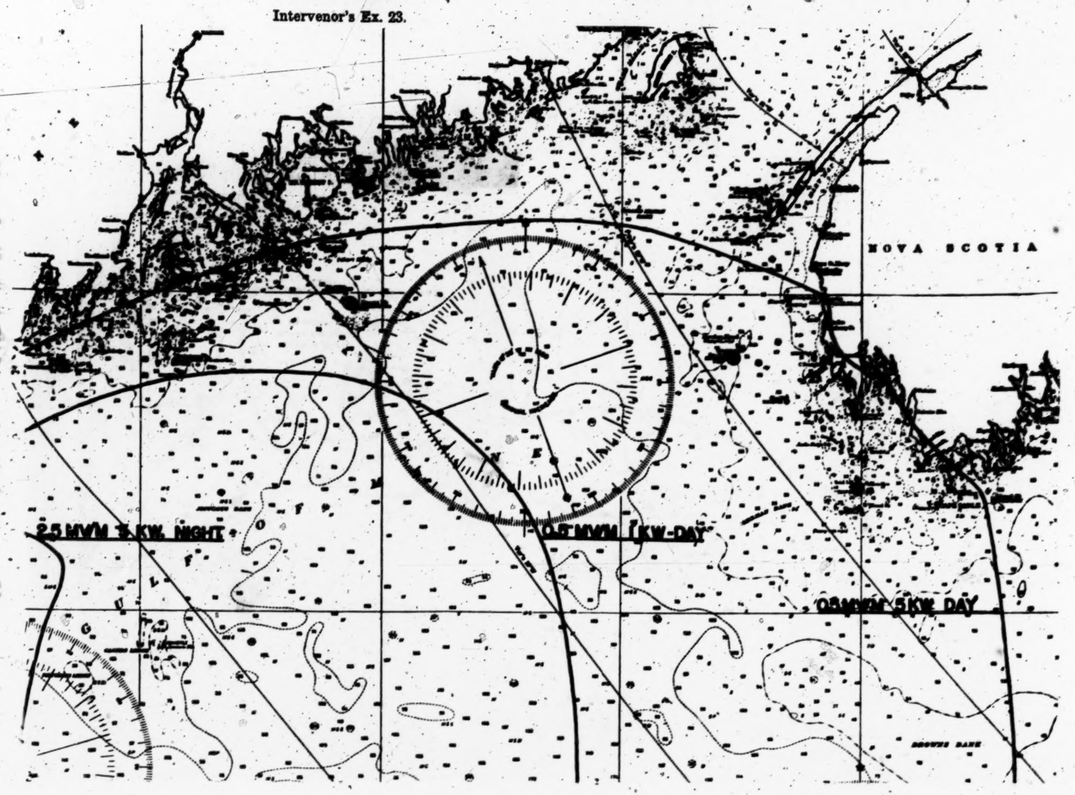
Hearing before Federal Communications Commission 1/29

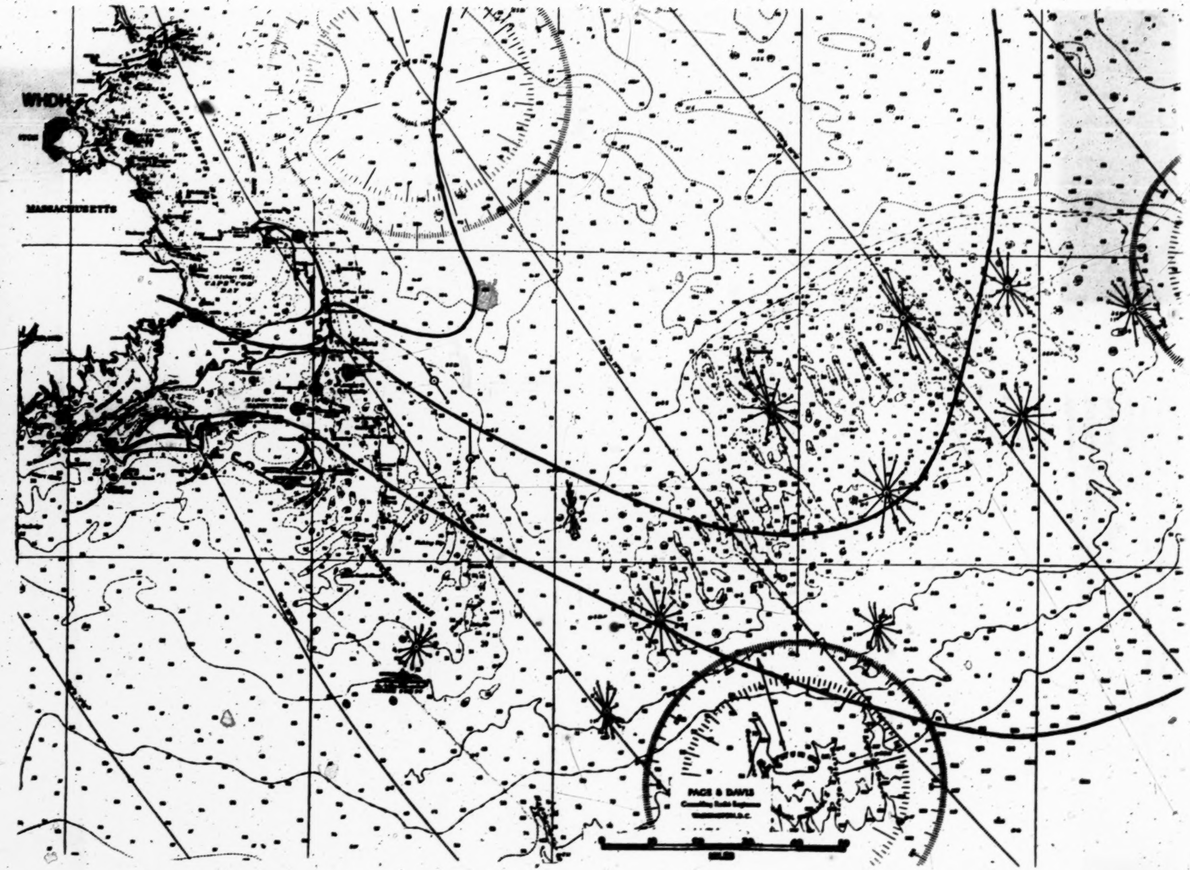
Electronic Official Reporter.

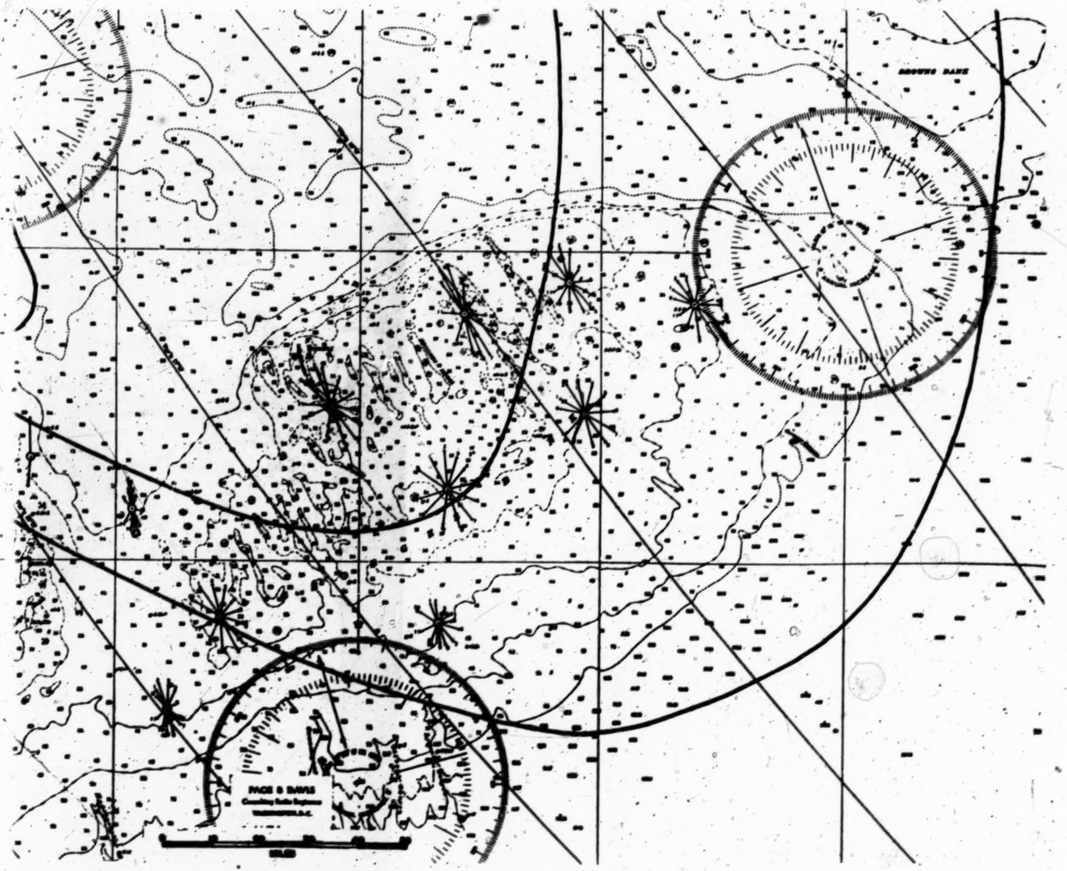
~~Appellant's Ex. 23~~
Intervenor's Ex. 23.



~~Appellant's Ex. 23~~
Intervenor's Ex. 23.



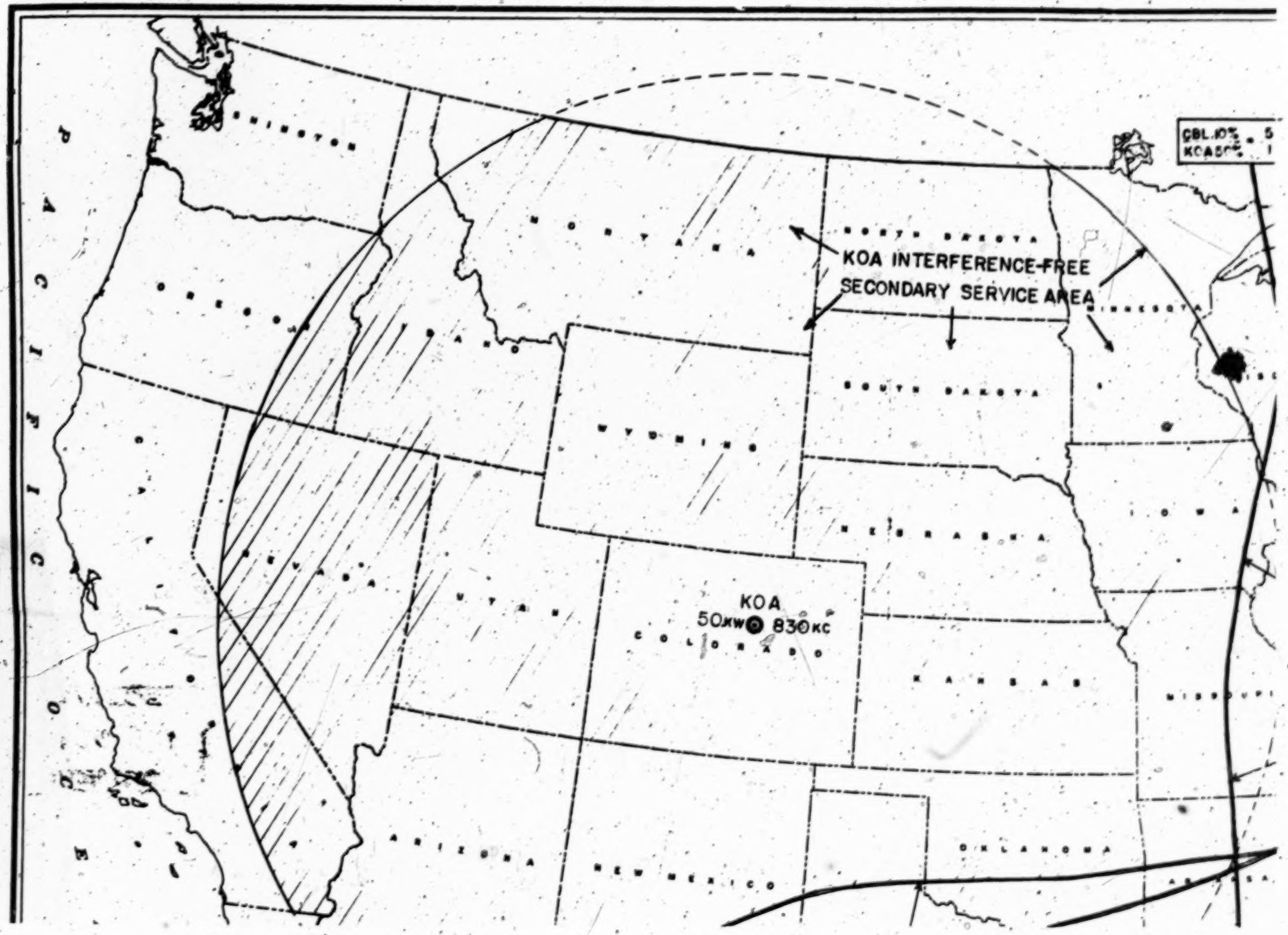

WHDH-7
MASSACHUSETTS
PAGE & DAVIS
Consulting Radio Engineers
Washington, D.C.


PAGE & DAVIS
Consulting Radio Engineers
Washington, D.C.

[redacted]

Intervenor's Ex. 24.

UNITED STATES
BASE MAP



[redacted]

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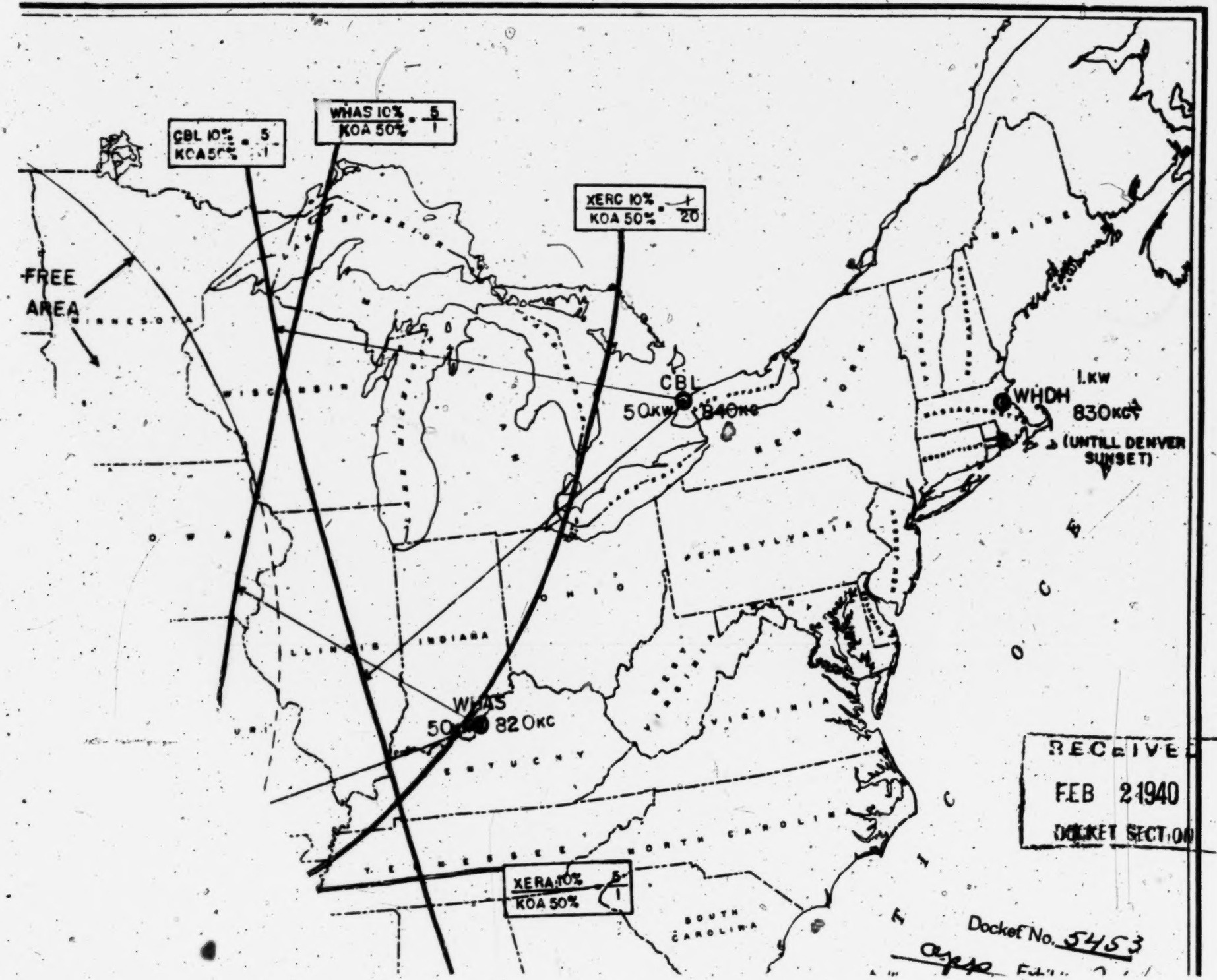
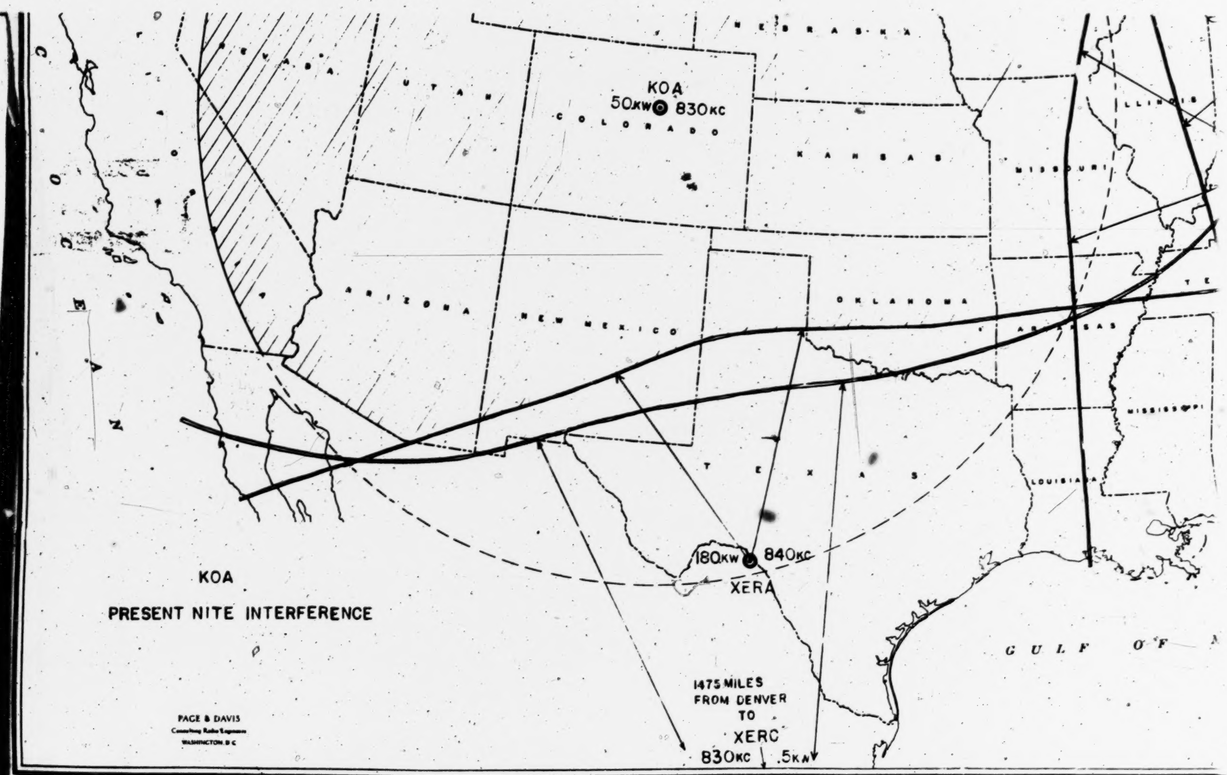
tervenor's Ex. 24.

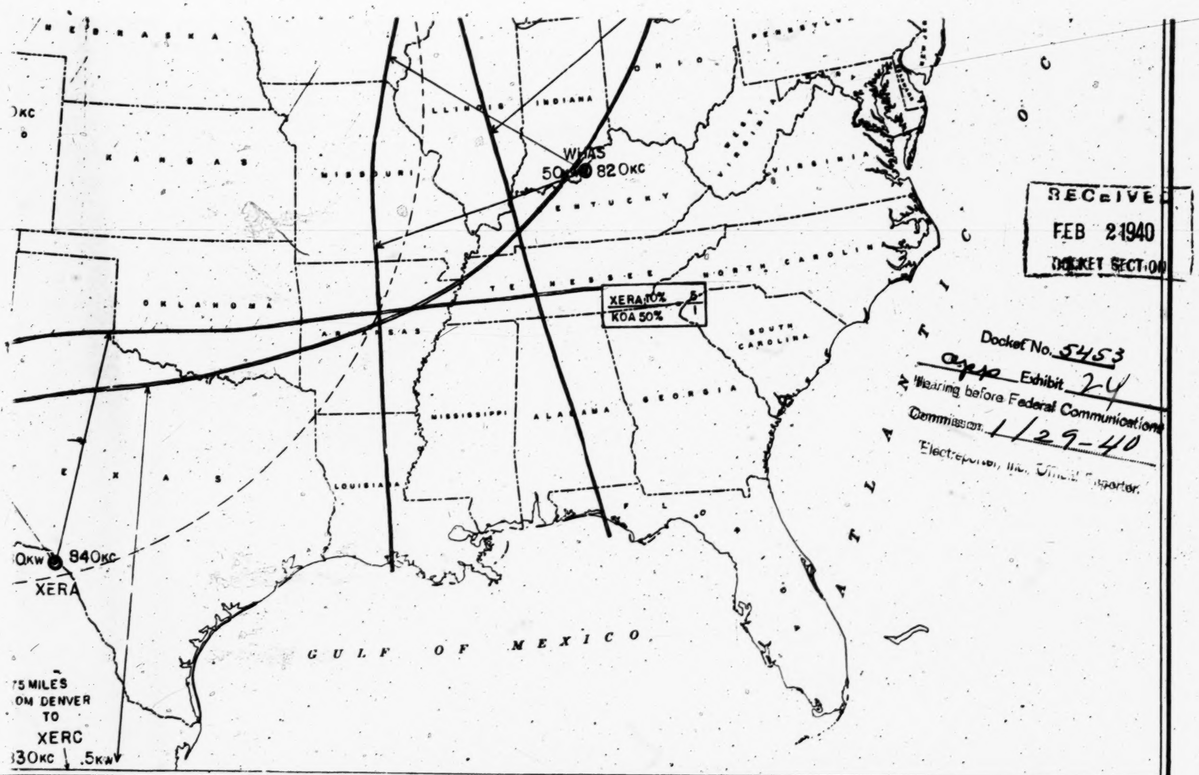
25

24

DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY







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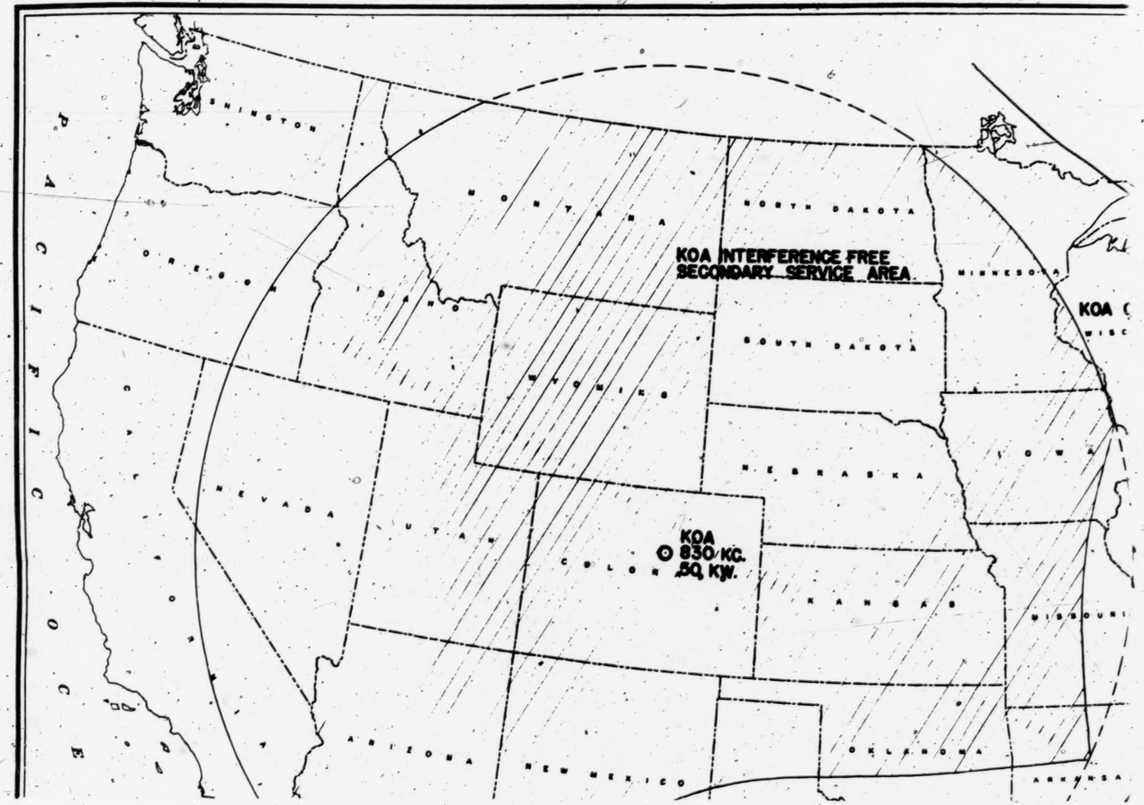
DOCKET SECTION

Docket No. 5453
Applicant Exhibit 24
Hearing before Federal Communications
Commission 1/29-40
Electrepeated by the Official Reporter.

~~Appellant's Ex. 28.~~

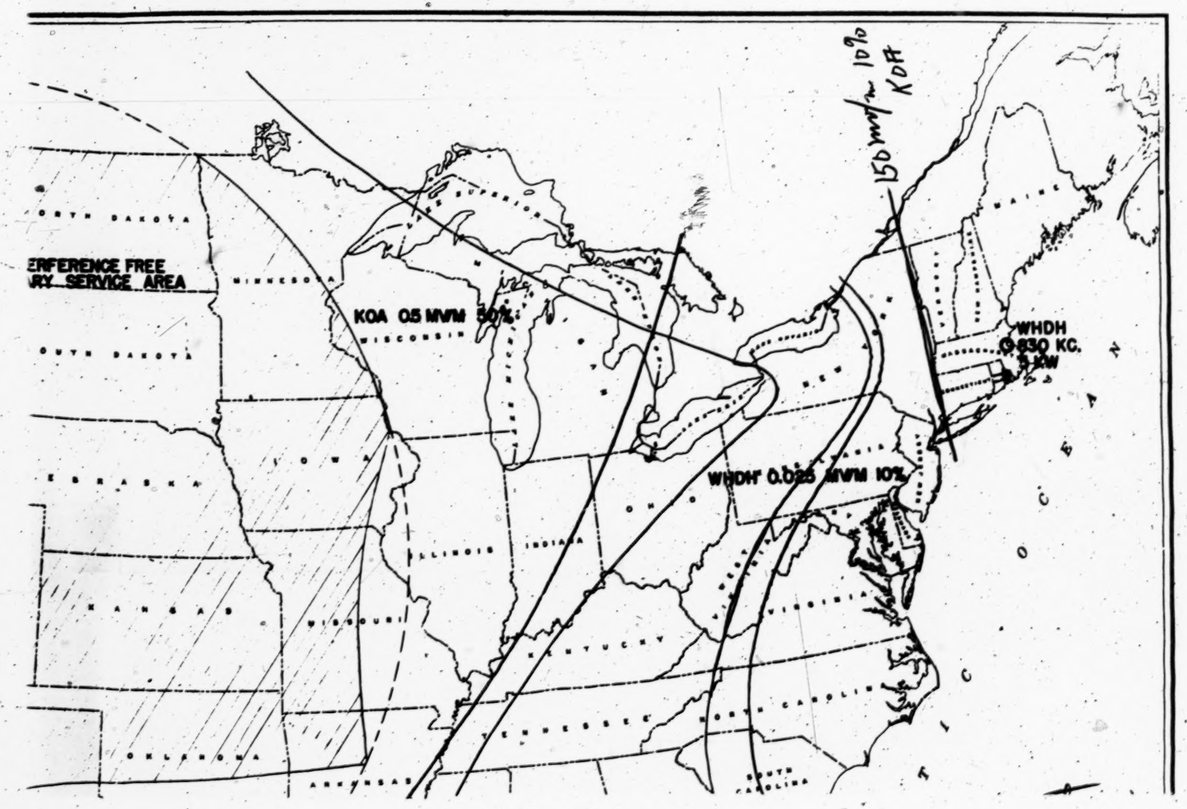
Intervenor's Ex. 28.

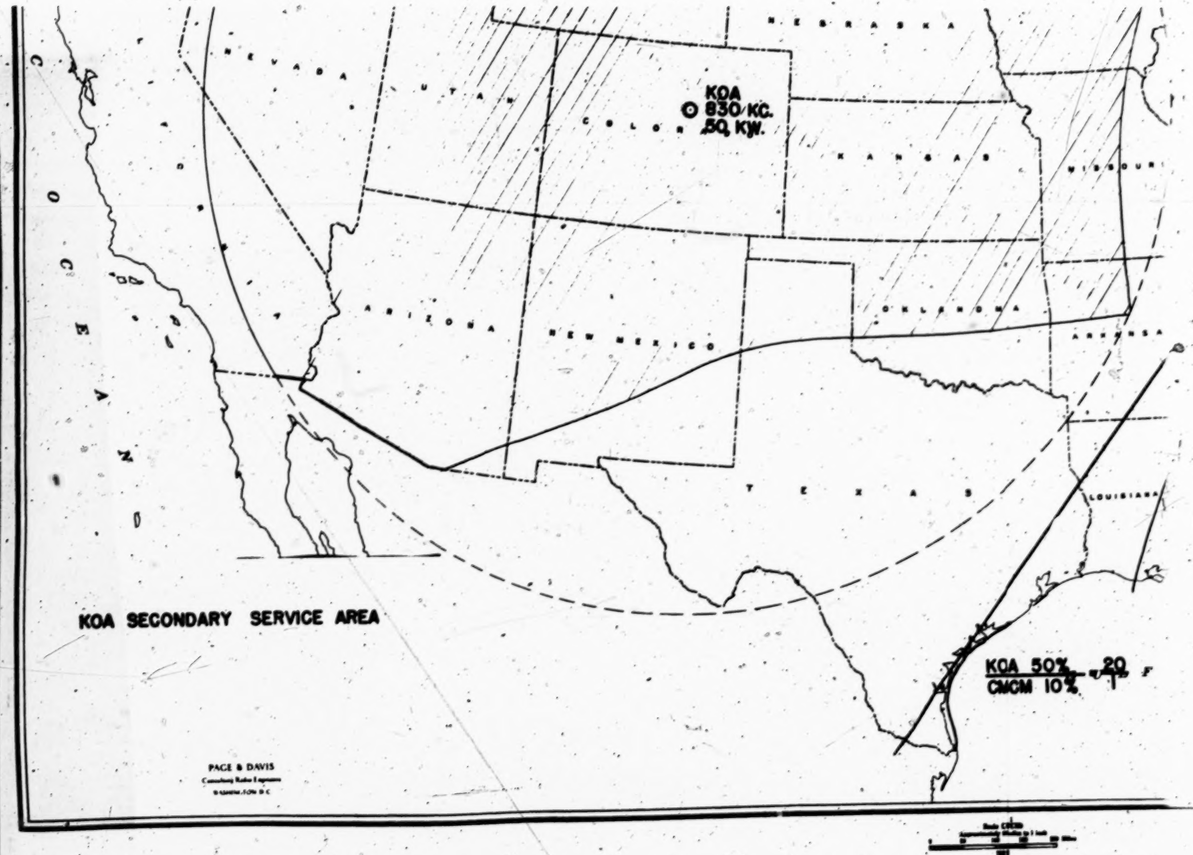
UNITED STATES
BASE MAP

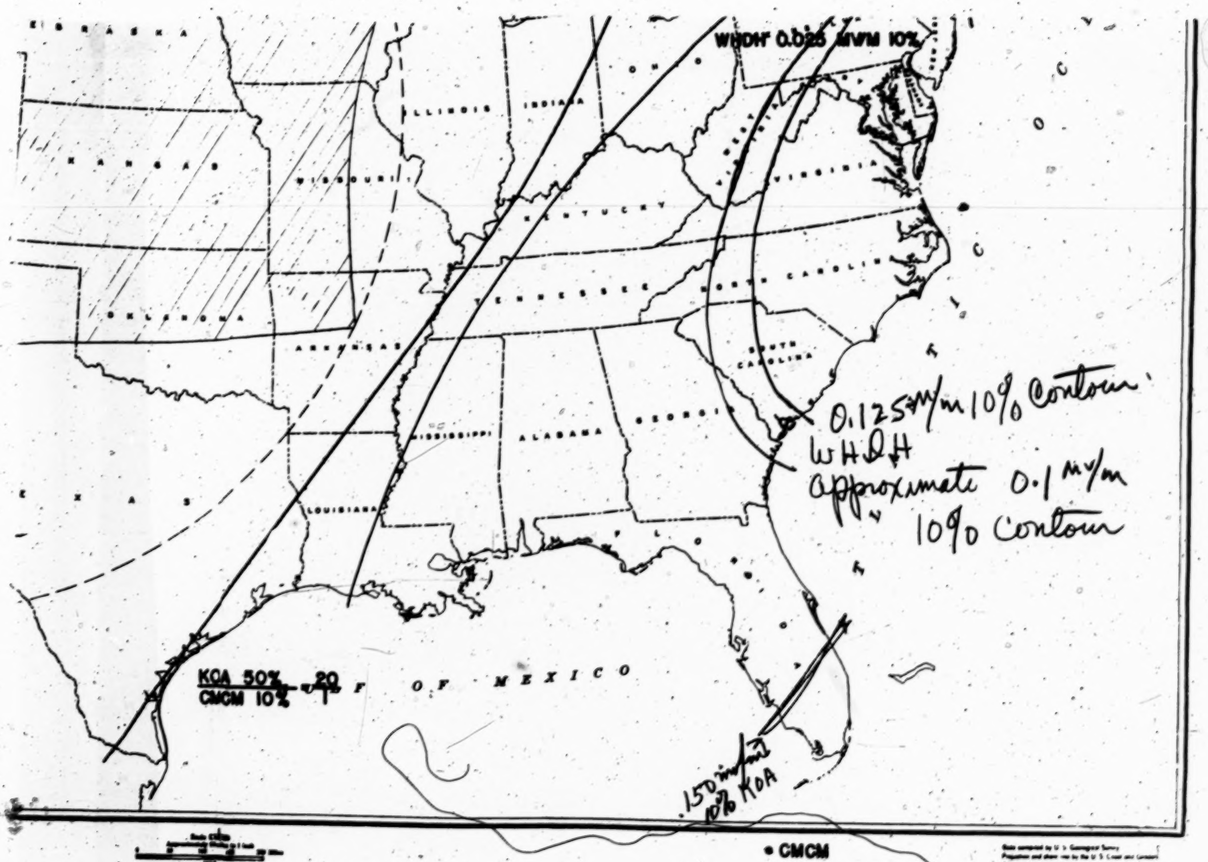


~~Appellant's Ex. 28.~~

Intervenor's Ex. 28.




KOA
830 KC.
50 KW.
KOA SECONDARY SERVICE AREA
KOA 50%
CMCM 10%
PAGE & DAVIS


WHDH 0.025 MVM 10%
0.125 mv/m 10% Contour
WHDH
Approximate 0.1 mv/m
10% Contour
KOA 50%
CMCM 10%
OF MEXICO
150 miles
10% KOA
• CMCM

1. Operating as proposed during the daytime, Station WHDH would increase the number of persons receiving satisfactory primary service from Station WHDH from 2,472,000 to 3,093,000, or a net increase of 621,000 people. During the nighttime, Station WHDH would render a new primary service to 2,285,700 people. Of the 2,307,897 people residing within the Boston Metropolitan Area, 2,185,000, or 94.9 per cent, would be able to receive satisfactory interference-free service from WHDH at night. (Ex. 21, 22) The proposed operation would furnish a signal to the entire business district of Boston having a value of 25 mv/m or more. (T. 64) [R. 133][1]

2. In addition to the increase in service to land population the proposed operation of Station WHDH would very substantially extend the daytime coverage of WHDH over the fishing banks situated off the New England Coast. Nighttime service to these fishing banks, hitherto unavailable to them from WHDH after sunset at Denver, would also result from the operation proposed. (Ex. No. 23) [R. 449]

3. The granting of the instant application will increase the number of hours during which WHDH may operate between present sign-off and midnight by a minimum of 2½ hours during the summer months and a maximum of 5½ hours during the winter months. (Ex. No. 7) [R. 412]

4. Station WEEU operates on the frequency 830 kc with 1 kw power, daytime only, at Reading, Pennsylvania. No operation is conducted by this station after sunset at Reading, Pennsylvania. The simultaneous operation of

483 WHDH (as proposed) and Station WEEU would not

[1] The reference "(T. 64)" is to the original transcript of testimony filed with the Commission. All succeeding references similarly made are to the original transcript. The reference "[R. 33]" is to this Court's record as paginated by this Court. All succeeding references similarly made are to this Court's pagination of its own record. The Court Record pagination has been added so that reference to the actual testimony on which the findings are predicated may be found with a maximum of convenience.

result in objectionable interference within the normally protected contours (0.5 mv/m during the daytime) of either station. (Ex. Nos. 1, 2, 3, 4, 8, 9, 17, 18; T. 45, 46, 203) [R. 397, 399, 406, 407, 414, 416, 432, 434; R. 214, 215, 374]

5. Station WABC operates on the frequency 860 kc with 50 kilowatts power unlimited time, at New York, New York. The proposed operation of Station WHDH would not cause objectionable interference to the operation of Station WABC at any point where Station WABC now renders satisfactory service. The proposed operation of Station WHDH would not receive objectionable interference from the operation of Station WABC within the normally-protected contours of the proposed operation of Station WHDH. (T. 46, 47) [R. 215, 216]

6. Station WRUF is located at Gainesville, Florida, and operates on the frequency 830 kc with 5 kilowatt power until sunset at Denver, Colorado. The simultaneous operation of Station WHDH (as proposed) and Station WRUF would not result in objectionable interference during the daytime within the normally-protected contours of either station. Under the Standards of the Commission, each of these stations are entitled to protection at night within their 2.5 mv/m ground-wave contours. The WHDH directional antenna system will be employed during evening hours beginning at sunset at Gainesville, Florida. (T. 57, 58) [R. 226, 227] At the second hour after sunset at Gainesville, Florida, which is the approximate time that Station WRUF signs off, the proposed operation of Station WHDH would not cause objectionable interference within the 1.75 mv/m ground-wave contour of Station WRUF, nor would Station WRUF cause objectionable interference within the 2.5 mv/m ground-wave contour of the proposed operation of Station WHDH. Inasmuch as Station WRUF signs off at Denver sunset, the time that the operation of Station KOA becomes a factor in the nighttime interference to the proposed operation of Station WHDH,

484

the root-sum-square method of computing interference is not applicable in computing the possible nighttime interference to the proposed operation of Station WHDH. (T. 57-59) [R. 226-228]

7. Station KOA is located at Denver, Colorado, and operates on the frequency 830 kc with 50 kilowatts power, unlimited time. The simultaneous operation of Station WHDH (as proposed) and Station KOA would not result, during the daytime, in objectionable interference within the normally-protected contours of either station. Station KOA would not cause objectionable interference, during the nighttime, within the normally-protected contour of the proposed operation of Station WHDH. (T. 59; Ex. No. 20) [R. 228] The proposed operation of Station WHDH would not cause objectionable interference, during the nighttime, within the 500 mv/m-50 per cent-sky-wave contour of Station KOA, (T. 79; Ex. No. 25) [R. 248; R. 446] nor would it cause interference at any point in the United States where Station KOA now has a signal that is free from objectionable interference from domestic and foreign stations operating on 830 kc or on its adjacent channels. The interference now caused to Station KOA by the present operation of these stations, operating on the same or adjacent frequencies, now imposes a much greater limitation upon the interference-free service area of KOA than would the proposed operation of Station WHDH. (T. 68-76, 120-121, 129-131, 218-221; Ex. No. 24) [R. 237-245, 291-292, 300-302, 389-392; R. 450]

8. Station KOA is a Class I station and is the dominant station operating on the frequency 830 kc, which
485 frequency is one of the 26 cleared-channel frequencies reserved by the Rules and Regulations of the Commission for the exclusive nighttime (*i.e.*, after sunset at the location of the dominant stations) use of the dominant stations. This complete exclusivity at night, and lack of exclusivity during daytime, results from the fact that at nigh the phenomena of sky-wave transmission exists,

whereas in the daytime it is non-existent. At no point does the sky-wave signal of these 50-kilowatt stations exceed, for 50 per cent or more of the time, the value of 1.3 mv/m. (T. 177) [R. 348] While Class I stations are designed to serve urban and rural areas, the exclusivity of their operation at night is not occasioned by demands for urban service, but by demands for rural service, inasmuch as urban areas can only be satisfactorily served by signals having a strength of at least 2.0 to 50.0 mv/m. No class of cleared-channed station furnishes a sky-wave signal approximating these values. (T. 177) [R. 348]

9. Sky-wave transmission is based upon the reflection of transmitted signals from some ionized layer in the upper atmosphere and returned to the ground at a point remote from the antenna of the station. This phenomena is only effective during the hours after sunset and before sunrise. The intensities of these signals vary from moment to moment, hour to hour, day to day, week to week, month to month, and year to year with changes in propagation conditions resulting principally from changes in the solar cycle. In general, when sky-wave transmissions are poor on one frequency for any extended period of time, a similar condition is observed on all of the frequencies in the broadcast band. Variations from day to day and season to season are, in general, considerably larger
486 than the variations from moment to moment. For determining the average strength of a sky-wave signal, the Commission has issued certain curves, which were based on studies made by the Commission. At any given instant the strength of any given sky-wave signal may vary widely from the values indicated by the said curves. However, the Commission requires the use of these curves as the best guide now available on the performance and characteristics of a sky-wave signal. T. 167-170) [R. 338-341] These curves were used by applicant's expert witness in computing the service and interference resulting from such sky-wave signals as are pertinent to the instant proceedings.

For determining the *service* rendered by a sky-wave signal the Commission, in its Standards, has specified the use of that value exceeded by the signal 50 per cent of the time. For determining the *interference* caused by a sky-wave signal the Commission, in its Standards, has specified the use of that value exceeded by the signal 10 per cent of the time. In determining the service rendered by, and interference caused by, such sky-wave signals as are pertinent to this proceeding, the applicant's expert witness employed these specified values. (Ex. 24; T. 68-74.) [R. 450; R. 237-243]

10. Whether sky-wave signals can be satisfactorily received by a listener depends upon the ability of the signal to overcome the interfering signals of other radio stations and the electrical disturbances caused by man-made electrical apparatus and natural electrical phenomena. (T. 175). [R. 346]

11. In the eastern part of the United States, without regard to other electrical disturbances, the sky-wave signals of KOA now lack the ability to overcome the objec-
487 tionable interference caused by the present operation of Radio Stations XERC, CMHI, XERA, CBL, and WHAS. One or more of these stations now completely prevent the interference-free reception of KOA signals by any listener residing east of the Mississippi River (Ex. No. 24; T. 68-77, 120-121, 129-131, 218, 219). [R. 450; R. 237-246, 291-292, 300-302, 389, 390]

12. Station XERC now operates with a power of 500 w. on the same frequency as KOA (830 kc) at Mexico City, D. F., which is 1475 miles distant from Denver, Colorado. This station causes objectionable interference to Station KOA south and east of a curved line commencing on the west at the southwestern corner of New Mexico and running in a northeasterly direction through northern Texas, southern Oklahoma, the middle of Arkansas, northwestern Tennessee, western Kentucky, southeastern Indiana, northwest-

ern Ohio, to the western tip of Lake Erie. This objectionable interference exists in all of the New England and the Middle Atlantic States, as well as in Ohio, Maryland, District of Columbia, Virginia, West Virginia, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, southern New Mexico, southern Arkansas and in all but the panhandle of Texas. (Ex. No. 24; T. 70) [R. 450; R. 239] If literal effect is eventually given to the present terms of the North American Regional Broadcasting Agreement (hereinafter referred to as the Havana Treaty), which becomes effective within the next year, Station XERC will cease to be a source of interference to Station KOA. However, as long as this or similar interference to KOA persists, it is the opinion of the expert witness of the Commission, that it would be good engineering practice to permit such operation as that proposed herein by Station WHDH. (T. 218-219.) [R. 389-390]

488 13. Station CMHI now operates with a power of 5 kw on the same frequency as KOA (830 kc) at Santa Clara, Cuba. This station now causes objectionable interference to Station KOA in the entire area of the United States lying to the east of the Mississippi River. If literal effect is eventually given to the Havana Treaty, Station CMHI will cease to be a source of objectionable interference to Station KOA. However, as long as this or similar interference to KOA persists, it is the opinion of the expert witness of the Commission that it would be good engineering practice to permit such operation as that proposed herein by Station WHDH. (T. 218-219.) [R. 389-390]

14. Station CMCM now operates on the frequency 850 kc, with 200 watts power, at Havana, Cuba. The frequency 850 kc is the frequency to which, according to the Commission's announcement, Station KOA will be assigned after the effective date of the Havana Treaty. Should Stations CMCM and KOA operate simultaneously on the frequency 850 kc, with their present power, KOA would receive ob-

jectionable interference in all parts of the United States where the proposed operation of Station WHDH could possibly be considered a source of objectionable interference to the signal of Station KOA. Should the above-mentioned interference between Stations KOA and CMCM eventuate, it is the opinion of the expert witness of the Commission, that it would be good engineering practice to permit such operation as is proposed herein by Station WHDH. (Ex. No. 28; T. 120-121, 129-131, 219-221). [R. 455; R. 291--292, 300-302, 390-392]

15. Station WHAS is a Class I station located at Louisville, Ky., and operates on the frequency 820 kc, (just
489 10 kc removed from the frequency 830 kc assigned to KOA) with power of 50 kw, unlimited time. The frequency 820 kc is reserved by the Rules and Regulations of the Commission for the exclusive nighttime use of Station WHAS. Station CBL is a Class I station located at Toronto, Canada, and operates on the frequency 840 kc (just 10 kc removed from the frequency 830 kc assigned to KOA) with power of 50 kw, unlimited time. Since each of these adjacent-channel stations, with respect to KOA, maintain the same relative frequency position under the allocations provided in the Havana Treaty, interference conditions now caused by them to KOA wil not be mitigated by the effectuation of the Havana Treaty. (T. 70, 71, 77.) [R. 239, 240, 246].

16. In determining the interference that exists between stations operating on adjacent channels, one of the most important factors is the selectivity of receivers, *i.e.*, the ability of receivers to tune out an undesired signal on an adjacent channel and to receive the desired signal without objectionable interference from the undesired station. (T. 172-173.) [R. 343-344] The selectivity of modern receivers cannot be further improved without losses in fidelity, *i.e.*, without losses in the ability of the receivers to reproduce the sound-frequencies. It is a matter of common knowledge that receivers employing push-button tuning have been

widely introduced to the market since the year 1936. Push-button tuning does not permit of the accurate and precise tuning necessary to obtain the maximum selectivity from receiving sets. (T. 88.) [R. 257] During the year 1936 the Commission conducted extensive tests on the selectivity of the receivers then in use and determined that 85 to 90 per cent of such receivers could tune out an undesired
490 sky-wave signal from an adjacent channel 10 kc removed that had a strength, for 10 per cent of the time, up to five times the strength maintained by the desired ground-wave signal for 100 per cent of the time. While 50 per cent of the receivers were found to have the ability, when accurately and precisely tuned manually, to tune out such an undesired signal having a strength up to 10 times that of such a desired signal, the Commission based its published Standards for determining objectionable interferences upon the performance of 85 to 90 per cent of the receivers then in use. To determine the objectionable interference that will result to a *desired ground wave*, present 100 per cent of the time, from an undesired sky-wave 10 kc removed and present only 10 per cent of the time, the Commission in its Standards prescribes the use of the ratio of 1 to 5. (T. 172-174, 217.) [R. 343-345, 388] The Standards of the Commission do not prescribe the ratio to be employed in determining interference to a *desired sky-wave* from an undesired sky-wave on an adjacent channel. This does not mean that interference does not exist, but that even though it does exist, the Commission's Rules, Regulations and Standards do not purpose to eliminate it. The listener is subjected to the interference, nevertheless. (T. 82.) [R. 251]

17. The expert witness of the applicant, in determining the objectionable interference caused to Station KOA by Stations CBL and WHAS, employed the ratio of 1 to 5, *i.e.*, it was determined that objectionable interference is caused to KOA wherever the sky-wave signal of KOA does not have a strength, for 50 per cent of the time, that is 1/5 of

the strength maintained by CBL and WHAS for 10 per cent of the time. The Commission in its Standards used this 1 to 5 ratio to determine the ability of a ground-wave
491 signal, that is steady and present as a source of service for 100 per cent of the time, to overcome an undesired sky-wave signal, unsteady and intermittent in nature, that is present as a source of interference during only 10 per cent of the time that the desired signal is present as a source of service. The applicant in this case used this 1 to 5 ratio to determine the ability of a desired sky-wave signal, that is unsteady and present as a source of service only 50 per cent of the time, to overcome an undesired sky-wave signal that is present as a source of interference during 10 per cent of the entire time or 20 per cent of the time that the desired signal is present as a source of service. (Tr. 89; Ex. No. 24.) [R. 258; R. 450]

18. On the basis of this ratio of 1 to 5 of KOA's 50 per cent sky-wave signal value *versus* WHAS's 10 per cent sky-wave signal value, Station WHAS causes objectionable interference to signals of Station KOA in all parts of the United States east of a line commencing on the north at the northwestern tip of Michigan and running in a direction slightly west of south to the approximate center of Missouri, thence in a southerly direction through the eastern portion of Arkansas and Louisiana to the Gulf of Mexico. This objectionable interference exists in all of the New England and the Middle Atlantic States, as well as in Maryland, District of Columbia, West Virginia, Virginia, North Carolina, South Carolina, Georgia, Alabama, Florida, Mississippi, Tennessee, Kentucky, Ohio, Indiana, Michigan, Illinois, the eastern half of Wisconsin, and the eastern portions of Iowa, Missouri, Arkansas, and Louisiana. (Ex. No. 24; T. 70-71.) [R. 450; R. 239-240] Inasmuch as Stations WHAS and KOA maintain this same frequency juxtaposition, under the Havana Treaty changes published
492 by the Commission, this objectionable interference will not be eliminated by the effectuation of the terms

of that Treaty. (T. 77.) [R. 246] Increases in the signal strengths of KOA and WHAS, through increased power or technical advances, would not change this interference situation. (T. 93.) [R. 262] This objectionable interference to the signal of Station KOA by the signals from Station WHAS now exists in all parts of the United States where the proposed operation of Station WHDH could possibly be considered a source of interference to the signal of Station KOA. (Ex. No. 24; F. C. C. Ex. 1.) [R. 450; 465]

19. On the basis of this same ratio of 1 to 5 of KOA's 50 per cent sky-wave signal-value *versus* CBL's 10 per cent sky-wave signal-value, Station CBL causes objectionable interference to the signals of Station KOA in all parts of the United States east of a line commencing at the northeastern tip of Minnesota and running in a direction slightly east of south through the center of Wisconsin, the eastern one-third of Illinois, the southwest corner of Kentucky, the western one-fourth of Tennessee, the center of Alabama, the northwestern part of upper Florida to the Gulf of Mexico. This objectionable interference exists in all of the New England and the Middle Atlantic States as well as in Maryland, District of Columbia, Virginia, West Virginia, Ohio, Indiana, North Carolina, South Carolina, Georgia, the eastern one-half of Wisconsin, the eastern one-third of Illinois, the eastern three-fourths of Kentucky and Tennessee, the eastern one-half of Alabama, and all but the northwestern tip of Florida. (Ex. No. 24; T. 71.) [R. 450; R. 240] Inasmuch as Stations CBL and KOA maintain this same frequency juxtaposition, under the Havana Treaty assignments, this objectionable interference will not be
493 eliminated by the effectuation of the terms of that Treaty. (T. 77.) [R. 246] Increases in the signal strengths of KOA and CBL, would not change this interference situation. (T. 93.) [R. 262] With the exception the western one-fourth of Kentucky and Tennessee, the western one-half of Alabama, and the state of Mississippi, this objectionable interference to the signal of Station KOA by the

signals from Station CBL now exists in all parts of the United States where the proposed operation of Station WHDH could possibly be considered a source of interference to the signal of Station KOA. As stated in paragraph 17, above, in the aforesaid portions of Kentucky, Tennessee, Alabama and Mississippi where CBL is *not* a source of objectionable interference, Station WHAS now *does* cause objectionable interference to the signal of Station KOA.

20. Station XERA operates at Villa Acuna, Mexico, with power of 180 kw on the frequency 840 kc, which frequency is just 10 kc removed from the frequency of Station KOA. On the basis of the ratio of 1 to 5 of KOA's 50 per cent-sky-wave signal-value *versus* XERA's 10 per cent-sky-wave signal-value, Station XERA causes objectionable interference south of a line commencing on the west at the southwestern corner of Arizona and running in a direction somewhat north of east to the approximate center of the State of Tennessee. This objectionable interference exists throughout the States of Georgia, Florida, Alabama, Mississippi, Louisiana, in all but the panhandle of Texas, and in the southwestern one-fourth of New Mexico, the southern one-third of Oklahoma and Tennessee, and the southern two-thirds of Arkansas. This interference might be eliminated by the effectuation of the Havana Treaty. (Ex. No. 24; T. 69.) [R. 450; R. 238]

494 21. From the foregoing paragraphs 10 to 20, inclusive, it is clear that the present sky-wave signals of Station KOA do not have the ability to overcome objectionable interference from existing stations and that, while with the effectuation of the Havana Treaty, there might be a reduction in the *number* of stations that now cause objectionable interference to Station KOA, very substantial objectionable interference will still exist from at least two stations in the areas of the United States within which the proposed operation of Station WHDH could possibly be considered as a source of interference. Furthermore, the useability of the sky-wave service of Station KOA is de-

pendent upon something more than its freedom from objectionable interference from existing radio stations. To be useable by a listener, the KOA signals must also be capable of overcoming local noise-levels, *i. e.*, the electrical disturbances caused by man-made electrical apparatus and natural electrical phenomena. (T. 175.) [R. 346]

22. It is the opinion of the applicant's expert witness that listeners residing in the areas in which the sky-wave signals of Station KOA do not reach a value of at least 500 uv/m for 50 per cent of the time, do not receive a useable signal from Station KOA, because of the inability of the KOA signal to overcome local noise-levels, as well as its inability to overcome objectionable interference from existing stations. (Ex. No. 24, 25; T. 81-85.) [R. 450, ; R. 250-254] At no place within the area in which WHDH could possibly be considered a source of interference to Station KOA does Station KOA render a signal in excess of 330 uv/m for 50 per cent of the time. (F. C. C. Ex. 1; T. 194.) [R. 465; R. 365] In the areas along the Atlantic Coast the KOA signal has a value of much less than 100 uv/m
495 for 50 per cent of the time. (T. 80.) [R. 249] In all of these areas the KOA signal may reach a zero value for a very substantial portion of the time. (T. 83.) [R. 252]

23. It is the opinion of the expert witness of the Commission that, under average conditions of rural noise-level, a sky-wave signal having a strength of less than 200 uv/m for 50 per cent of the time is not capable of overcoming rural noise-levels. (T. 182-185.) [R. 353-356] Station KOA does not furnish sky-wave signals having this value in any part of the New England or the Middle Atlantic States, nor in Ohio, West Virginia, Maryland, District of Columbia, Virginia, North Carolina, South Carolina, Georgia, and Florida, nor in four-fifths of Alabama, the southeastern parts of Louisiana and Mississippi, and the eastern one-half of Michigan. In the area in which it might possibly be considered that the proposed operation of Station

WHDH would cause interference, only the northeastern corner of Alabama, the western one-fifth of Tennessee and Kentucky, the central portions of Mississippi and Louisiana, the very northeastern tips of Minnesota and Wisconsin, and the western one-half of Michigan receives a signal of 200 uv/m for 50 per cent of the time. (F. C. C. Ex. No. 1.) However, in each of these latter areas, even if it is conceded that the signals of KOA can overcome rural noise-levels, it definitely cannot overcome the objectionable interference now caused by Stations XERC, XERA, CMHI, WHAS, and CBL. (Ex. No. 24; T. 68-76, 120-121, 129-131, 218-221.) [R. 450; R. 237-245, 291-292, 300-302, 389-392]

4. The disability of KOA's signal in overcoming rural noise-levels in eastern United States might be partially cured by an increase in the power of KOA to 500 kw, or more, or by technical advances in the operation of the
496 Station. However, the objectionable interference caused by Stations WHAS and CBL would remain the same if the entirely reasonable assumption is indulged that these latter two stations will make similar improvements in their signal strength. Furthermore, the co-channel interference from Stations XERC and CMHI could not possibly be overcome in such a manner. (T. 85-86.), [R. 254-256] Even though Station KOA should increase its power to 500 kw, it could not possibly render a signal to the east coast of the United States having a value of 500 uv/m for 50 per cent of the time. (T. 111.) [R. 282] This latter value of signal is necessary, in the opinion of the applicant's expert witness, to render a useable secondary service to rural areas. (T. 81-85.) [R. 250-254]

25. Should an increase in power later be authorized to Station KOA, which increase would require an amendment to the Commission's Rules and Regulations, it could be accomplished without increasing the interference-limitation (2.5 mv/m groundwave) to the proposed operation of Station WHDH. This could be done by the employment of a

directional antenna at Station KOA that would restrict the radiation to 50 kw power over a narrow angle in the direction of Boston. The signal intensity of KOA would thereby be increased in all directions from Denver, except towards Boston. In such a manner Station KOA could extend its 500 uv/m 50 per cent-sky-wave contour to include all of the States of Washington, Oregon, California, and Texas. The value of the intensity of KOA's sky-wave signal would be improved for rural listeners in these states as well as in Idaho, Montana, Nevada, Arizona, and New Mexico. Even without the proposed operation of WHDH, the signal of KOA could not be appreciably improved for the re-
497 ception of rural listeners residing in eastern United States because of the objectionable interference from other existing stations. The states of Washington, Oregon, Idaho, and Montana receive less secondary service, both from the standpoint of intensity and number of signals available, than any other section of the United States. Because of the relative concentration of cleared-channel facilities in the eastern one-half of the United States, rural listeners in eastern United States have available to them a far greater number of secondary services than the rural listeners in the western states, particularly the states of the Pacific Northwest. (T. 90-95; Ex. No. 24.) [R. 259-264; R. 450]

26. Thus far, in analyzing the service rendered by Station KOA to the eastern part of the United States, these findings have been devoted to an analysis of KOA service purely from the standpoint of electrical availability. The *usefulness* of the signal of any station to a listener depends upon more than its mere electrical availability, inasmuch as a signal electrically available may transmit programs for which the listener has no need, interest, or convenience. In this connection, Station KOA is licensed to the National Broadcasting Co. and is a major outlet for the Red Network of the National Broadcasting Co. (T. 98; Ex. No. 26, 29.) [R. 267; R. 452, 457] In addition to numerous primary-

service facilities, eleven secondary-service facilities, each of which furnishes sky-wave signals to the eastern half of the United States having a value equal to or greater than the value of the sky-wave signals of KOA in the same area, are affiliated with the Red Network of the National Broadcasting Co. Four of these Stations are Class I-B stations and receive protection from interference out to their
498 respective 500 uv/m-50 per cent-sky-wave contours. Seven are of the same classification as Station KOA (*i.e.* Class I-A) and have exclusive use of their respective frequencies during their nighttime operation. All but one of these eleven secondary-service facilities operate with a power of 50 kw. If there is a public necessity, convenience, or interest in improving Red Network signals in the eastern half of the United States, an improvement of the signal strength of any one or all of these eleven facilities would accomplish a greater improvement in service to rural listeners in this area than improvement in the signal strength of Station KOA. (T. 111-115.) [R. 282-286]

27. Inasmuch as rural listeners are substantially dependent upon sky-wave signals for service, which signals vary considerably in strength during any given period, two signals for each program or type of program are desirable to furnish continuous service. (T. 116.) [R. 287] With the exception of Florida, every rural listener residing in the eastern one-half of the United States is able to receive at least two and as many as six sky-wave signals, each with a value of 500 uv/m for 50 per cent or more of the time, from the Red Network Stations of the National Broadcasting Co. Station KOA could not furnish a 500 uv/m for 50 per cent of the time to the State of Florida even if it increased its power to 500 kw and, further, could not render interference-free service to Florida because of the objectionable interference caused by existing stations. (Ex. No. 26; T. 115-119.) [R. 452; R. 286-290]

28. In that area in which, were it not for objectionable interference from existing stations, Station KOA would ren-

der a signal which the Commission's expert witness regards as useable by rural listeners (northeastern corner of
499 Alabama, the western one-fifth of Tennessee and Kentucky, the central portions of Mississippi and Louisiana, the very northeastern tips of Minnesota and Wisconsin, and the western one-half of Michigan—See paragraph 23, above) there are at least six and as many as eight sky-wave signals available from the secondary-service facilities of the Red Network, of the National Broadcasting Co., each of which has a value equal to or greater than the value of the KOA sky-wave signal in the same areas. These stations are WHO, WMAQ, WFAA-WBAP, WOAI, WSB, WTAM, WEAF, and WGY. (Ex. Nos. 24, 25, 26; T. 68-76, 114, 120-121, 129-131, 218-221.) [R. 450, 451, 452; R. 237-245, 285, 291-292, 300-302, 389-392]

29. During the week of October 22 to 28, 1939, inclusive, 73.2 per cent of KOA's programs were duplicated by as many as sixteen secondary-service facilities located at points east of a north-and-south line through Denver. Many of these stations are located east of the Mississippi River and furnish a much higher-grade electrical service to eastern United States than does KOA. The KOA programs that were not broadcast by any of these other secondary service facilities were news programs, programs of Denver University, musical programs, recorded music and programs of local interest to Denver. (Ex. No. 29; T. 157-161.) [R. 457; R. 328-332] It is a matter of common knowledge that almost every radiobroadcast station in the United States, including those located east of the Mississippi River, conduct frequent news-broadcasts daily and undoubtedly many of them subscribe to the same national and international news-services as does Station KOA. Collectively, they undoubtedly make use of all the news sources that are available to KOA, except the sources from which KOA receives news local to Denver. It is also a matter of
500 common knowledge that many of the stations located east of the Mississippi River make their facilities

regularly available for the broadcasts of institutions of higher learning. It is likewise of common knowledge that the two largest talent-centers in the United States are located east of the Mississippi River and that the musical productions of this talent finds almost continuous expression over radio stations located in the eastern half of the United States.

501 *Proposed Conclusions.*

1. The operation of Station WHDH, as proposed in the instant application, would not cause objectionable interference to the interference-free service now satisfactorily received by radio listeners in the United States from Stations KOA, WRUF, WEEU, and WABC; nor would these latter four stations cause objectionable interference to the interference-free service that radio listeners, under the Commission's Standards of Good Engineering Practice, should receive from the proposed operation of Station WHDH.

2. The frequency 830 kc, involved in this application, is one of the twenty-six cleared-channel frequencies, which, under the Rules and Regulations of the Commission, are reserved for the exclusive nighttime use of the Class I stations assigned thereto, only one of which stations are assigned to each of the twenty-six frequencies. Class II stations are permitted to operate on these frequencies only during the time before sunset at the location of the Class I stations. The difference between the daytime and nighttime use of these frequencies is occasioned by the fact that during the nighttime both sky-wave and ground-wave signals exist as a serviceable medium of transmission, whereas, during the daytime only the ground-wave signal is present as a serviceable medium of transmission. A ground-wave signal exists, as a source of service or interference, in areas relatively close to the location of the transmitter. A sky-wave signal on the other hand exists, as a source of service or interference, in areas relatively far-distant from the location of the transmitter. The failure to assign Class II

stations to these twenty-six cleared-channel frequencies for operation after sunset at the Class I stations can only
502 be for the purpose of according interference protection to the sky-wave signals of the Class I stations.

3. Class I stations are designed to serve large urban centers and extended rural areas. The failure to allow duplicate nighttime operation on any of these frequencies, however, cannot be for the purpose of affording service to urban centers, inasmuch as a sky-wave signal never has sufficient strength to satisfactorily serve urban centers of population. Non-duplication at night, therefore, can be purposed only to afford service to listeners, residing in rural areas. The only listeners who could, by any stretch of the imagination, be harmed by the nighttime duplication on 830 kc, herein sought, are rural listeners.

4. Station KOA is the Class I station assigned to the frequency 830 kc and operates with 50 kw power at Denver, Colorado. It is licensed to the National Broadcasting Co. and is a major outlet of that Company's Red Network.

5. The *useability* of a signal to a listener depends upon its electrical availability; *i.e.*, upon the ability of that signal to overcome interfering signals from other radio stations and to overcome the disturbances caused by man-made electrical apparatus and natural electrical phenomena. The *usefulness* of a signal to a listener depends, in addition to its electrical availability, upon the need, convenience, or interest of the listener in the programs carried by that particular signal. *The facts adduced at the hearing on the instant application conclusively prove that, in the area where the proposed operation of Station WHDH could possibly be considered as a source of interference to Station KOA, the signal from KOA is not now electrically avail-*
503 *able, nor do the listeners residing in this area have any need, interest, or convenience for the programs of Station KOA. KOA is useless to them.*

6. The signals of Station KOA are not electrically available to listeners residing in that part of the United States where the proposed operation of Station WHDH could possibly be considered a source of interference, for the reason that the objectionable interference caused by Stations XERC, CMHI, XERA, CBL, and WHAS now impose a greater limitation upon the interference-free service of Station KOA than would the proposed operation of Station WHDH. The objectionable interference caused by Stations XERC, CMHI, and XERA might be eliminated by the effectuation of the pending Havana Treaty, but, *according to the Commission's Engineer,* as long as the present or similar objectionable interference persists it would be good engineering practice to permit such operation as is proposed by Station WHDH. The changes in frequency-assignment that will be made by Station KOA with the effectuation of the Havana Treaty, may give rise to objectionable interference from Station CMCM to such an extent that, *according to the Commission's engineer,* it would be good engineering practice to permit such operation as is herein proposed by Station WHDH. The objectionable interference now caused by Stations WHAS and CBL will not be eliminated by the effectuation of the Havana Treaty; which objectionable interference, in and of itself, now imposes a greater limitation upon the interference-free service area of Station KOA than would the proposed operation of Station WHDH. *No listeners in the United States who, either before or after the effectuation of the Havana Treaty, satis-*
504 *factorily receive interference-free service from Station KOA, would be deprived of that service by the proposed operation of Station WHDH.*

7. The signals of Station KOA are not electrically available to listeners residing in that part of the United States where the proposed operation of Station WHDH could possibly be considered as a source of interference, for the further reason that they do not have the ability in this area to overcome the electrical disturbances caused by man-made

electrical apparatus and natural electrical phenomena. If we indulge the assumption that the Commission may someday amend its present rules to allow Class I stations greater power than 50 kw and further assume that KOA will take advantage of the permitted increase in power, this inability to overcome local noise-levels might be eliminated in certain western parts of the area in question. However, if we indulge in such assumptions fairly, we must also assume that Stations CBL and WHAS, both Class I stations, will also increase their power, in which case, the present inability of Station KOA to overcome the objectionable interference of Stations CBL and WHAS would remain. *No reasonable assumption of forseeable future conditions can possibly support a prediction that KOA's signal might someday be electrically available to the listeners in the area in question.*

8. In addition to its lack of electrical availability to listeners residing in eastern United States, the listeners in that area have no need, interest, or convenience in the reception of the programs carried by the signals of Station KOA. With the exception of listeners residing in Florida, to whom the signals of KOA could not become available under any forseeable circumstance, every rural listener residing in eastern United States receives the programs of the Red Network of the National Broadcasting Company from at least two and as many as six Class I stations, each of which furnishes a better signal to these listeners than does KOA. Station KOA is licensed to the National Broadcasting Company and is a major outlet of that Company's Red Network. During an entire week in October of 1939, 73 per cent of KOA's programs were duplicated by as many as sixteen Class I stations that serve all or parts of the area in question with a signal equal to or better than that of Station KOA. The remaining 27 per cent of KOA's programs were devoted to news, music and to programs of a University local to Denver. These are common types of programs, having no unique value and are substantially duplicated as to type by every station licensed

to operate in eastern United States. There cannot possibly be any doubt that the talent available for the musical, news, and educational programs of many eastern stations compares favorably, qualitatively and quantitatively, with the talent available for the musical, news, and educational programs of Station KOA. From the foregoing it is manifest that *the signals of KOA are useless to listeners residing in the area in which the proposed operation of Station WHDH could possibly be considered as a source of interference, because the KOA signals are not electrically available and the listeners residing therein have no need, interest, or convenience for receiving the programs of Station KOA.*

9. *Should it be assumed that stations XERC, CMHI and XERA will cause no objectionable interference to Station KOA after the reallocations under the Havana Treaty and should we blindly ignore the objectionable interference that will persist, even after the Treaty, from Stations CBL and WHAS, there still remains certain unconquerable and insuperable facts. The KOA signal, according to the Commission's own engineer, cannot overcome rural noise-levels in any part of the theoretical WHDH interference-area, except in certain relatively small sections just east of the Mississippi River where there are at least six and as many as eight better sky-wave signals available from other secondary-service facilities of the Network with which KOA is affiliated. The applicants engineer testified that the KOA signal is impotent even in these small areas. Furthermore, in all of the United States east of the Mississippi River there is not a single listener who has any real need, convenience, or interest in the program service carried by the signal of KOA. Appendix A, hereof, forcefully and graphically demonstrates this condition and the futility of any hope of future service from Station KOA to the area in question, even though we ignore facts which are themselves decisive and controlling.*

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10. The Commission has uniformly held that the need, interest, or convenience of listeners is the principal criterion

in determining the public interest, convenience, and necessity in any broadcast matter pending before the Commission. *It is clear from the evidence adduced at the hearing on the instant application that no listeners could possibly benefit by the Commission's denial of the WHDH application, whereas, over two million listeners would benefit by the granting thereof. That the public interest, convenience, and necessity would be served by granting the instant application is clear and beyond all possible doubt.*

507 11. No future circumstances can reasonably be foreseen that might alter the public interest, convenience, and necessity in granting the application here in issue. However, even though by overtaxing the imagination one might conjure up future conditions that would render the KOA signal useful in eastern United States, the Commission is under no necessity of indulging in such dream-stuff. Licenses are only granted for terms of one year. The same public interest, convenience, and necessity that is the touchstone to the Commission's decision on an application for an original license or permit governs also the Commission's decision on applications for renewal of such licenses. Should any future conditions arise that would render it against the public interest for WHDH to continue its proposed operation, the Commission has the full power and the definite duty to deny the application of WHDH for renewal of license. Certainly, the problems of today and the immediate future are perplexing enough to occupy our whole attention, without unnecessarily attempting to deal with future conditions that are impossible to forsee and that would require the Commission, not to act as experts, but as clairvoyants.

12. Succinctly stated, any argument in favor of denying the WHDH application must argue for protecting "the little service that isn't there." That never will be there.

13. The Commission has promulgated Rules and Regulations which, if applied mechanically, do not permit the op-

eration proposed herein by Station WHDH. The applicant makes no argument that these Rules, in their general application, do or do not serve the public interest, con-
508 venience, or necessity. The Commission very properly, in its Bill of Particulars raised the question as to whether or not the Rules "properly interpreted and applied preclude the granting of the application."

14. The Rules of the Commission are merely implements or tools to be used to aid the Commission in accomplishing service to the public interest, convenience and necessity in deciding on the particular applications and matters coming before it. Surely, it would be highly improper for these tools to be used in injuring service to the public interest, convenience and necessity. To indulge in such improper use would render the rule unreasonable and a decision based on such improper use would be arbitrary and capricious. The oft-repeated statement of the Commission that its Rules must have flexibility in their application together with the multitude of instances where the Commission has refused to allow mere mechanical application of its Rules, is eloquent in its affirmance of the principle just enunciated. *The Commission has not permitted its Rules to be employed as obstacles to obscure and defeat the public welfare, the justice, and the legal merits of the matters coming before it.*

15. It is manifest that the proper interpretation and application of the Commission's Rules is to apply and interpret them *in each case* in a manner that will accomplish the most service to the public interest, convenience, and necessity and to, *in each case,* avoid an application and interpretation of the rules that will redound to the detriment of the public interest, convenience, and necessity.

16. It is submitted that, based on the premises aforesaid, the public interest, convenience and necessity
509 will be served by the granting of the instant applica-

tion of the Matheson Radio Co., Inc., licensee of Radio-station WHDH.

Respectfully submitted,

MATHESON RADIO CO., INC.,

By: W. THEODORE PIERSON

W. THEODORE PIERSON,

ANDREW G. HALEY,

Its Attorneys.

Address:
Earle Bldg.,
Washington, D. C.

Exhibit A—See Page 50a

553 *Opposition of Matheson Radio Co., Inc. to Petition to Intervene of National Broadcasting Company*

Comes now Matheson Radio Co., Inc., through its attorneys, and opposes the petition of National Broadcasting Company (licensee of Station KOA, Denver, Colorado) to intervene in the above entitled cause.

In support whereof Matheson Radio Co., Inc. (Station WHDH) shows as follows:

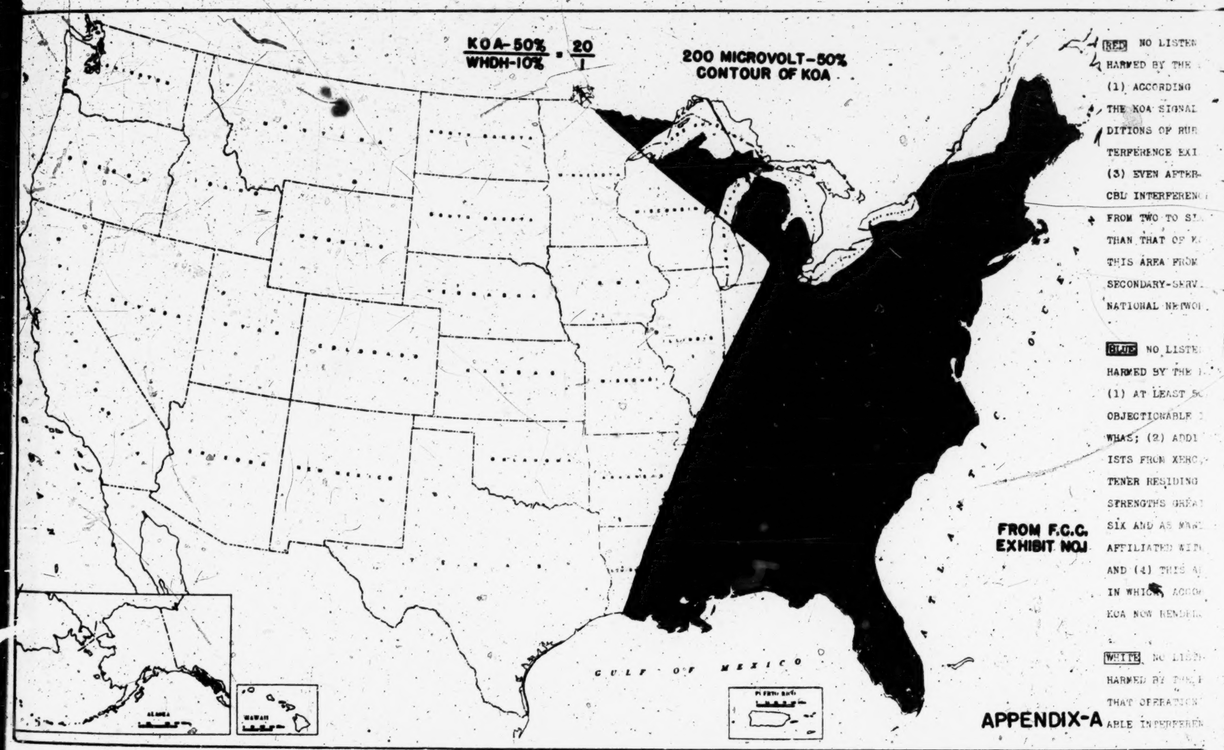
(1) The petition, in spite of all of its camouflaging arguments on the merits and the law of the WHDH case, must stand or fall for what it is—a petition to intervene. The petitioner asserts the legal right or requests the privilege to be heard before a final decision is rendered on the application of WHDH.

(2) The only classes of persons who are accorded the legal right to be heard under Title III of the Communications Act of 1934, are the following:

(a) Applicants whose applications are to be denied.

(b) Licensees whose licenses are to be revoked or modified.

(c) Licensees for whom the issuance of a regulation will change the frequency, authorized power, or time of operation of the stations licensed to them.



FROM F.C.C. EXHIBIT NO.

APPENDIX-A

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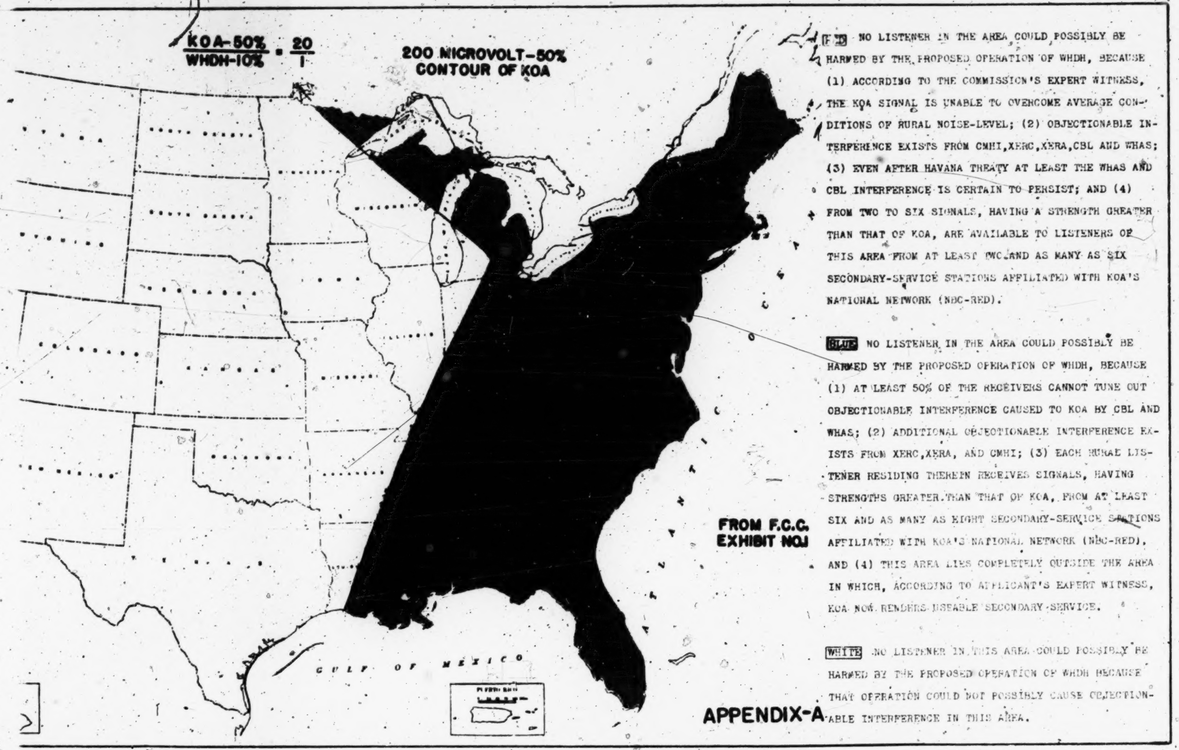

FROM F.C.C. EXHIBIT NO.

APPENDIX-A

RED NO LISTENER IN THE AREA COULD POSSIBLY BE HARMED BY THE PROPOSED OPERATION OF WHDH, BECAUSE (1) ACCORDING TO THE COMMISSION'S EXPERT WITNESS, THE KOA SIGNAL IS UNABLE TO OVERCOME AVERAGE CONDITIONS OF RURAL NOISE-LEVEL; (2) OBJECTIONABLE INTERFERENCE EXISTS FROM CMHI, XERC, XERA, CBL AND WHAS; (3) EVEN AFTER HAVANA TREATY AT LEAST THE WHAS AND CBL INTERFERENCE IS CERTAIN TO PERSIST; AND (4) FROM TWO TO SIX SIGNALS, HAVING A STRENGTH GREATER THAN THAT OF KOA, ARE AVAILABLE TO LISTENERS OF THIS AREA FROM AT LEAST TWO AND AS MANY AS SIX SECONDARY-SERVICE STATIONS AFFILIATED WITH KOA'S NATIONAL NETWORK (NBC-RED).

BLUE NO LISTENER IN THE AREA COULD POSSIBLY BE HARMED BY THE PROPOSED OPERATION OF WHDH, BECAUSE (1) AT LEAST 50% OF THE RECEIVERS CANNOT TUNE OUT OBJECTIONABLE INTERFERENCE CAUSED TO KOA BY CBL AND WHAS; (2) ADDITIONAL OBJECTIONABLE INTERFERENCE EXISTS FROM XERC, XERA, AND CMHI; (3) EACH RURAL LISTENER RESIDING THEREIN RECEIVES SIGNALS, HAVING STRENGTHS GREATER THAN THAT OF KOA, FROM AT LEAST SIX AND AS MANY AS EIGHT SECONDARY-SERVICE STATIONS AFFILIATED WITH KOA'S NATIONAL NETWORK (NBC-RED), AND (4) THIS AREA LIES COMPLETELY OUTSIDE THE AREA IN WHICH, ACCORDING TO APPLICANT'S EXPERT WITNESS, KOA NOW RENDERS USABLE SECONDARY SERVICE.

WHITE NO LISTENER IN THIS AREA COULD POSSIBLY BE HARMED BY THE PROPOSED OPERATION OF WHDH BECAUSE THAT OPERATION COULD NOT POSSIBLY CAUSE OBJECTIONABLE INTERFERENCE IN THIS AREA.

tation KOA has no application pending before the Commission which, so far as this proceeding is concerned, is to be denied. So far as this proceeding is concerned, KOA's license is under no threat of revocation or modification. So far as this proceeding is concerned, no rule or regulation is proposed or in prospect that will change the frequency, the authorized power or the time of operation of KOA. From the foregoing it is clear that KOA has no vestige of legal right to a hearing before a decision on the application of Station WHDH.

(3) To make out its intervention as a matter of privilege, available only at the discretion of the Commission, petitioner is bound by the requirements of Section 1. 102 of the Rules of Practice and Procedure which provides that the petitioner must set forth "the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest * * *"

(a) The petitioner has no definable interest in these proceedings. The allegation of the petitioner that the proposed operation of WHDH would "result in interference to Station KOA in areas where KOA signals are now interference-free" is simply not a fact. The record in this case conclusively shows that the proposed operation of WHDH will not cause interference in any area where KOA now renders interference-free service. The petitioner does not allege that this evidence is erroneous or that the petitioner possesses any evidence to the contrary. Perhaps the petitioner was dreaming of what it might serve if and when the North American Regional Broadcasting Agreement ever becomes effective in whole or in part. This is such a conjectural future prospect that it is wholly fictitious as a present interest.

(b) Assuming, *arguendo*, that KOA has an interest, it has failed completely in its petition to allege one fact to demonstrate that its participation will serve the public in-

terest. It would like to file motions, cross-examine witnesses, present evidence, file findings, file exceptions and request oral argument. Lawyers generally like to
555 do these things. But what about the public interest? How will all of these legalistic exercises benefit the public interest? The petition is completely silent on this fundamental requirement for intervention.

(4) The petition, instead of establishing grounds that would furnish the basis for the privilege of intervention, takes advantage of the petition to express its views on the merits and the law involved in the WHDH case. As a stranger to the proceedings, and as one who has no right or privilege to be anything else, these views of KOA might be appropriate for a law review or trade journal article but are wholly irrelevant and impertinent to the instant question of intervention. It appears clear that the petitioner has misconstrued the time and place for expressing its views.

(5) Prior to the hearing on the instant application the petitioner filed a petition to intervene in the proceeding to which applicant offered no opposition. On September 29, 1939 this petition was denied in the Motion Docket. The denial was unanimously affirmed by the Commission *en banc* on October 10, 1939. The instant petition presents no new facts in support of the right or privilege to intervene. It merely rehashes the same old facts and adds wholly gratuitous expressions of its views on totally irrelevant matters. Those facts were not sufficient at the beginning of the proceeding, *A fortiori*, they are not sufficient now; especially, when petitioner seeks to void the whole proceeding *ab initio*. The petitioner states in effect, that he will ask that the expense and time applicant and the Commission has devoted to this cause become a complete loss, even though petitioner has failed in two attempts to establish any basis of personal or public interest for his participation.

(6) It is suggested that the questions here presented are fundamental and, in view of the past proceedings in

the case, should be passed upon by the Commission *en banc.*

556 WHEREFORE it is respectively submitted that the petition of the National Broadcasting Company to intervene should be denied.

Respectfully,

MATHESON RADIO COMPANY, INC.
By ANDREW G. HALEY,
Earle Building,
Washington, D. C.

By W. THEODORE PIERSON,
Munsey Building,
Washington, D. C.

Its Attorneys.

765 *Order*

Upon consideration of the Petition for Stay filed April 11, 1941 by National Broadcasting Company, Inc. (KOA), Denver, Colorado, requesting the Commission to stay its Order of April 7, 1941 granting the application of Matheson Radio Company, Inc. (WHDH), Boston, Massachusetts, and the opposition filed April 14, 1941 by Matheson Radio Company, Inc. (WHDH), to the Petition for Stay;

It Appearing, That the sole basis for the relief requested in the Petition for Stay is an allegation of "great and irremediable damage" to the private rights of petitioner without any facts to support it and that, therefore, petitioner has failed to state a ground for Stay; and,

It Appearing Further, Upon an independent examination of the facts and circumstances, that public interest, convenience and necessity will be served by the Commission, on its own motion, staying its action of April 7, 1941 pending the filing and determination of a Petition for Rehearin-:

Now Therefore, It Is Ordered, This 22nd day of April, 1941, that the Petition for Stay filed April 11, 1941 by National Broadcasting Company, Inc. (KOA) Be, And It Is Hereby, Denied.

It Is Further Ordered on motion of the Commission that the Order of the Commission April 7, 1941 in the above-entitled matter Be, And It Is Hereby, Suspended, pending the filing by National Broadcasting Company, Inc. (KOA), within the time allowed by the Statute, of a Petition for Rehearing and the determination thereon by the Commission or until further order of the Commission.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

Signed By Above Mailed by Apr 23 1941 Mail And Files

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806 *Opposition of Matheson Radio Company, Inc. (Station WHDH) to Petitions for Rehearing of National Broadcasting Company (Station KOA) and Earl C. Anthony et al. (The Clear Channel Group): and Opposition of Matheson Radio Company, Inc., to the Berks Broadcasting Company's (Station WEEU) Petition for Reconsideration and Request for Modification of Order.*

Comes now Matheson Radio Company, Inc., licensee of Station WHDH, Boston, Massachusetts, the applicant in the above entitled proceedings, through its attorneys, and opposes:

1. The petition of National Broadcasting Company, Inc., (Station KOA) for rehearing,

807 2. The petition of Earl C. Anthony et al. (The Clear Channel Group) for rehearing, and

3. The petition of Berks Broadcasting Company (Station WEEU) for reconsideration and request for modification of order.

All of the points made in each of the foregoing petitions have heretofore been presented to the Commission by said petitioners, and all of the points made have been fully and completely answered by Matheson Radio Company. The points made by the petitioners were completely argued by each of them before the Commission. Those arguments were completely answered before the Commission in the argument on behalf of Matheson Radio Company. The answers herein are not intended to be exhaustive, in view of the fact that a most comprehensive record covering all of the points is already before the Commission.

Opposition to the Petition of National Broadcasting Company, Inc. (Station KQA) for Rehearing.

I.

National Broadcasting Company (hereinafter called National) admittedly is not a party to this proceeding. Its petitions for intervention were rejected by the unanimous vote of the Commission.

In its petition to intervene dated September 23, 1939*. National did not allege that it would receive any
808 financial or pecuniary damage or injury. That petition was denied by Commissioner Payne on October 2, 1939.**

* On page 5 of its brief, National refers to a petition for rehearing filed by it on February 23, 1939. This statement is undoubtedly inadvertent, as the Commission's records fail to disclose any petition for intervention filed on February 23, 1939. The statement undoubtedly refers to the petition to intervene of September 23, 1939.

** In the National Broadcasting Company brief, the following statement is made: "This petition to intervene was denied by Commissioner Payne on October 2, 1940, and on October 10, 1940, a petition to review his action, filed under Section 1.256 was also denied by the Commission." The dates stated are undoubtedly in error, as the actions indicated were taken in 1939.

Following the denial of the petition to intervene dated September 23, 1939, counsel for National filed a "petition for review under Section 1.256." Here again National failed to state or claim that it would be financially or economically injured because of electrical interference or any other factor by the granting of the application of Matheson Radio Company. The petition was considered by the Commission on October 10, 1940, and by a unanimous vote thereof, was denied.

Again on December 16, 1940, National petitioned to intervene in this proceeding, and again National wholly and completely failed to state that it would be aggrieved or adversely affected because of financial or pecuniary considerations.

Finally, National has filed the instant petition for rehearing. There is absolutely no claim, and not even a left-handed inference, in this petition that National will suffer financial or economic injury by the granting of the application of Matheson Radio Company.

The simple fact remains that during this long proceeding, National has not at any time claimed that it would be adversely affected or aggrieved within the meaning of the statute as interpreted by the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia.

So far as this case is concerned, National has no *locus standi* before the Commission or before the Courts.

809 Section 405 of the Communications Act of 1934, providing for rehearing before the Commission, limits those who may petition for rehearing to "any party or any person aggrieved, or whose interests are adversely affected" by a decision, order or requirement of the Commission. National has not even alleged any legal aggrievement or adverse effect, and accordingly the instant petition should be dismissed with prejudice.

The phrase "any person aggrieved or whose interests are adversely affected" appearing in Section 405 of the Act must have the same legal meaning as "any other per-

son aggrieved or whose interests are adversely affected" appearing in Section 402b(2) of the Act. In interpreting the latter phrase, the Supreme Court stated, in *Federal Communications Commission* v. *Sanders Brothers*, 309 U. S. 470, "It [Congress] may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license." Thus, financial injury is the test, and a mere allegation of interference is insufficient. Cf. *Brown Radio Service and Laboratory* v. *Federal Communications Commission* (decided February 3, 1941, by United States Court of Appeals for District of Columbia.)

In the *Sanders* case the Supreme Court also pointed out, "We hold, therefore, that the respondent had the requisite standing to appeal, and to raise, in the Court below, any relevant question of law in respect of the order of the Commission." Those words clearly show that as National would have no standing in the Court of Appeals under any section of the Act, it could not raise questions involving the proceeding in which it had no right to participate
810 or to appeal from. In other words, if National had a proper standing it could raise any relevant question, but having no standing it can raise no question.

II.

If we assume, *arguendo*, that the petitioner has the right to petition for rehearing, it will be found that the several "errors" alleged by the petitioner are baseless and without merit, and accordingly the petition should be denied. The discretion which the Commission can exercise under Section 405 of the Act is necessarily sound discretion, and we submit the allegations of the petitioner contain no basis for the favorable exercise of sound discretion. Accordingly, if the petition were granted, the Commission would be abusing its discretion.

The petitioner's allegations concerning interference are wholly fictional. It may be briefly pointed out that Station KOA does not render interference-free service to any rural listeners in the eastern part of the United States. It will never do so until the adjacent-channel interference caused by clear-channel stations WHAS, Louisville, Kentucky, and CBL, Toronto, Canada, are removed. Applicant knows of no proposal or prospect for the removal of these latter stations as an interference factor to KOA. Stations CBL and WHAS are each entitled to increase power to 500 KW. insofar as the Havana Treaty is concerned. If we are to assume an increase in power by KOA at some time in the future, we must also assume increases in power by CBL and WHAS. In such an event the interference-free service area of KOA would not be enlarged to cover any more of the area of the eastern part of the United States than it now does. Incidentally, even though National has applied for 500 kilowatts on behalf of another of its stations it did not do so for KOA. The KOA
811 interference-free service to this eastern area is now, and promises ever to be, a wholly fictional thing that exists only in the minds of those who, for one purpose or another, choose to ignore realities. Station WHDH knows of no competent engineer who honestly denies this.

National's specifications of error numbered 2, 3 and 4, relating to the unanimous actions of the Commission in denying its petition to intervene of September 23, 1939, its motion to dismiss WHDH's application of September 29, 1939, and its petition to intervene dated December 15, 1940, are wholly without merit. National did not allege any facts or legal bases for favorable action by the Commission. These matters heretofore have been argued in writing and orally *ad nauseam*.

National's No. 1 specification and No. 1 argument is that the Commission erred in failing to return the WHDH application under Section 1.72 of its rules, because WHDH was applying for full time on a frequency having as its dominant station, KOA. This is an utterly pious argument,

designed by National to make the Commission tread the straight and narrow path of rule observing. Yet, under exactly the same procedure that the WHDH application was set for hearing, this pious petitioner had its own application to increase the power of WJZ to 500,000 watts in violation of Commission's rules, also retained by the Commission and set for hearing (B1-P-1098). It was perfectly all right for this Jeremiah to request in violation of the rules the use of 500,000 watts power in the largest metropolitan district in the United States, and for the Commission to retain that application and set it for hearing, but it is not all right for the Commission, under exactly the same rules and exactly the same procedure, to retain and consider the application of an independent station in Boston.

812 Counsel for National must know that Rule 1.72 did not become effective until January 1, 1939. The application of WHDH, and the application of National just referred to (WJZ—B1-P-1098) were filed under the provisions of Rule 104.1. In both cases the applications were returned to the respective applicants and under the existing procedure, the applications were refiled and made available for the Commission's consideration. In the case of WHDH the application was returned by the Commission on September 21, 1938, and on October 24, 1938, it was resubmitted and accepted for filing. (See Report No. 732, October 27, 1938.)

In specification 5, National contends that the Commission is without power to amend its rules by removing the frequency 850 kilocycles from 3.25(a) to 3.25(b) of its regulations. Congress gave such power to the Commission, and Congress is the only body that can abrogate the power. The Commission has the power to amend its rules without holding any hearing whatsoever. It derives that power from the Act creating the Commission, and it has carried into its own rules a further expression of the power contained in the Act, namely Rule 1.21, which reads, "The rules and regulations of the Commission may be suspended, revoked, modified, amended, or supplemented, in

whole or in part, at any time by the Commission". The action of the Commission in this case, in amending its rules, is not subject to judicial review.

Specification No. 6 touches upon the same point, but in that specification, National conceives of the Commission as being some sort of a marionette that jumps up with a black robe on and is then termed quasi-judicial, and having performed, then disappears to jump up with a toga on to
813 act in a legislative capacity. National apparently is trying to build up a straw man on the basis of the *Arizona Grocery Company* v. *Atchison, etc., Railway Company* case (284 U. S. 370). In doing so, National is only disclosing its own conception that it has property rights in the frequency 850 kilocycles. Because, in the *Arizona Grocery Company* case, the Supreme Court decided that if the Interstate Commerce Commission, having set a maximum reasonable rate in obedience to the command of the statute, it could not, in a suit for damages, hold that the maximum rate thus set up was unreasonable.

The entire point of the case is that private property rights had accrued under the maximum rate set, and to change the maximum rate with retroactive effect would be an *ex post facto* legislative act.

The Commission, in the WQAM decision, has already pointed out that the classifications of stations as Class 1, 2, 3 etc., is merely for administrative convenience, and that such classifications do not apply to any license, and confer no rights upon any licensees.

The Supreme Court of the United States and the United States Court of Appeals for the District of Columbia have ruled without exception that licensees have no property rights in frequency. The point made by National is wholly without merit and is contrary to the settled law.

In line with the foregoing discussion, National in Specification 5 also states that amending the rule has resulted in a modification of its license without a hearing, contrary to Section 312(b) of the Act, but the simple fact is that the Commission has not modified the license of Station KOA.

Likewise, National contends that a change has been made in its license without its consent, contrary to Section 303(f) of the Act. We grow weary showing the ineptitude
814 of these claims. KOA's frequency has not been changed. It still will operate on 850 kilocycles, its authorized power remains the same, and the times of operation remain the same.

In the same tenor, the claim is made that a change in policy results from the action of the Commission, and that the hearing should have been held before an examiner. The action of the Commission is strictly in conformity with its existing policy. The policy of the Commission in duplicating stations on clear channels has found expression in connection with KPO, WLAW, KFEQ, WPTF, KMPC, WOR, KIRO, WBAL, WLB, WCAL, WEW, WJZ, KXA, KGO, KOAM, WGY, WCFL, WIBG, KJR, WBZ, WBZA, KTHS, KYOS, WTIC, KWJJ, KRLD, KNX, WIBC, KFBI, WEAU, KGDM, KWKH, WCAR, WOV, WAPI, WSPR, KVOO, WMAZ, WDGY, KOB, WINS, WJSV, KSTP, WMEX, WLAC, KGA, WHIP, WKBW, KOMA, WPRP, KFBK, WCKY.

National fears we may prejudice priority rights under the Havana Treaty. Again it deals in fictions. What good is the right of protection from foreign stations operating on the same channel, when it is not sufficient to free KOA from interference from adjacent channels in the eastern half of the United States. It is but an empty and useless right. But even the claim that the Havana Treaty protects our so-called Class I-A stations from objectionable interference within the borders of our country is a fallacy. If we adopt the Treaty definition of objectionable interference as between stations operating on the same channel (20 to 1, desired or undesired) and have in mind that the Treaty permits foreign stations operating on our Class I-A frequencies to transmit nighttime signals having a value of 25 uv/m-10 per cent of the time at our border, it is clear that the KOA signal, to be interference-free in the
815 United States, must have a value of 500 uv/m-50 per

cent of the time at all points within the United States. Even if KOA operated with 1,000,000 watts it could not meet this requirement.

As a sort of summation KOA talks of "degrading" the 850 kilocycles frequency as a result of the Commission's order. Does one degrade a frequency by refusing to recognize fictions and to overlook realities? Could anything be more horribly degrading to a frequency than to hold that service it doesn't render should be protected? Applicant first wishes to question the propriety of the term "degradation" and, failing there to persuade, to suggest its adoption as a basic and fundamental policy of the Commission.

National raises an issue concerning 307(b) of the Act. No listeners who receive interference-free satisfactory service from KOA have been deprived thereof by the order of the Commission. All of the listeners living in that area where KOA renders only "poor" and "occasional" service receive seventy-five per cent of the programs broadcast by KOA from many other stations that furnish them with much better electrical service. No other listeners of KOA can possibly be affected. On the other hand, 2,285,000 listeners who do not now receive nighttime service from WHDH, nor do they receive the programs of WHDH from any other station, will receive nighttime service from WHDH as a result of the final order of the Commission.

In Specification No. 7 National charges that as a result of the order there will be a new kind of use of the frequency 850 kilocycles. This contention, of course, is preposterous. The Commission does not contemplate using 830 kilocyles as a video channel for television, or anything of the sort.

Specification No. 8 has already been answered from many viewpoints.

816 The remaining specifications merely express the complaint that National was deprived of a hearing, and that in any event sufficient evidence was not adduced at the hearing which was held. In answer to those propositions, it is perfectly clear that National had no rights to

a hearing, and that the findings of the Commission are supported by ample facts.

Opposition to the Clear Channel Group Petition for Rehearing.

In support of its opposition, applicant states as follows:

I.

Petitioners Have No Standing Under Act.

The petitioners have no standing to file a Petition for Rehearing under the Communications Act of 1934, and the petition should, therefore, be dismissed with prejudice. In support whereof, applicant states as follows:

A. Section 405 of the Communications Act accords the right to petition for rehearing only to parties to the proceedings or to persons aggrieved or whose interests are adversely affected by the decision, order, or requirement in question.

B. Petitioner is not and has never been a party to the instant proceeding. Petitioners with amazing, amusing and alacritous inconsistency both admit and deny this in their petition. Witness the following:

1. In paragraph one, page two, of the petition, petitioner states, "Petitioners have been, and are, parties to this cause * * *" Here they say they *are* parties,

817 2. In paragraph seven, page five, Petitioners state, "On December 5, 1939, the Commission, acting by order of Commissioner Case, ordered that petitioners' petition to intervene * * * be dismissed without prejudice." Here they say they were *refused* privilege of being parties.

3. In paragraph nine, page seven, Petitioners state, "petitioners thereupon, on December 16, 1940, filed their second petition to intervene * * * This petition

was referred to the full [sic] Commission and was denied January 7, 1941 * * *." So far as the public order and releases of the Commission show, this decision was unanimous. Here, again the Commission *refused* to make them parties.

4. In the "Specifications of Error", paragraph three, page twelve, Petitioners state, "Petitioners * * * were denied an opportunity to be heard, the right to present evidence and * * * the right to participate in the proceedings * * *." Here they assign, as error, the Commission's failure to make them parties.

While the petitioners can not seem to determine for themselves such a simple and obvious fact that they were not parties, applicant can state decisively that they were neither parties to the instant proceeding nor did they have the legal right to be parties. Specifically incorporated as a part hereof is the detailed argument showing the petitioners complete lack of legal right to be parties, contained in Part III-A of applicant's Brief filed on February 17, 1941, pages 2 to 11 inclusive. An indulgent Commission permitted the petitioners to become "Friends of the Court", but
818 that surely did not give them license to presume on that "Friendship" by arrogating to themselves privileges or rights which the Commission has conclusively and unanimously denied them.

C. Petitioners are not persons aggrieved or persons whose interests are adversely affected by the decision on which rehearing is sought. To be so classified, under the Act, they must show that they will suffer financial or economic injury, ensuing from electrical interference or otherwise, as a result of the decision of the Commission. Significantly, their petition fails to do any more than allege the conclusion that they will be aggrieved or adversely affected. No allegations, supporting this conclusion, are made. This omission is mute but conclusive evidence of the indubitable fact that even these privileged princes of broad-

casting, who have conjured, fancied, and perpetrated the "cleared-channel myth", cannot concoct or dream-up an even infinitesimal depletion of their overflowing coffers, as a consequence of the instant decision.

D. Since the petitioners are neither parties to the proceeding nor persons aggrieved or whose interests are adversely affected, their petition should be dismissed with prejudice.

II.

Insufficiency of Specifications of Error.

Assuming, *arguendo*, that petitioners have the right to petition for rehearing, the applicant submits that the petitioners' "Specifications of Error" are completely insufficient as a showing of error in the instant proceeding. In support whereof, applicant states as follows:

819 A. As their first specification, petitioners state:

> "1. The order is premised upon determination of an issue which had theretofore been expresaly excluded from the proceeding both by action of the Commission and by express disclaimers of the applicant, and, therefore, constitutes a denial of due process under the Fifth Amendment of the Constitution and a violation of the procedural requirements (including the right of persons who may be adversely affected to an opportunity to be heard and to present evidence) of the Communications Act of 1934."

In reply, applicant states that, since all the parties who have a legal or constitutional right to be heard in the instant case have agreed or acquiesced to the inclusion of the issues covered by the majority decision, there has been no denial of a fair hearing or due process of law in the instant proceeding. Applicant's argument, in support of this contention, contained in Part III-A of its Brief, filed on February 17, 1941, is specifically incorporated as a part hereof.

B. As their second specification, petitioners state:

"2. The order, insofar as it attempts to effect an amendment of Section 3.25, constitutes an improper exercise of a legislative function (with retroactive effect) in a judicial proceeding which is either (a) beyond the Commission's power, both under the Constitution and under the Communications Act of 1934, or (b) if the Commission has such power, does not represent a sound policy with respect to the procedure to be used in formulating and adopting amendments to its regulations, and, in any event, was contrary to the Commission's regulations, particularly Section 1.192, establishing a procedure consisting of informal hearings (either on petition or on the Commission's own motion) as the proper procedure for securing amendments to its rules and regulations."

In reply, applicant states that:

1. The contention that there is legal error in the amendment of a Rule, that affects no legal rights of the past, present, or future, is so ludicrous that one engages in superfluities to argue the matter. Furthermore, that it has "retroactive effect", challenges the most tenuous imaginings.

2. In spite of the fact that the Commission is neither a legislative nor a judicial body the petitioners speak of "legislative functions" and "judicial proceedings" as though they were legal terms, clearly defined, delimited and made applicable to the instant case by authoritative and controlling rules of law. There are no such rules of law in existence, either in the form of statutory enactments or judicial decisions. In Part III-B of the Applicant's Brief, filed on February 17, 1941, which is specifically incorporated as a part hereof, applicant presented detailed argument, conclusively showing that the Commission has the power and the

support of sound policy to amend Rule 3.25 as proposed.

C. As their third specification, the petitioners state:

"3. Petitioners, having an interest in the proceedings in that they would be aggrieved and their interests would be adversely affected by the amendment of Section 3.25, were denied an opportunity to be heard, the right to present evidence, and (except as herein noted) the right to participate in the proceedings, through
821 the Commission's actions denying petitioners' petitions to intervene, filed September 29-30, 1939, and December 16, 1940."

This contention was treated in Part I of this pleading and need not be repeated here.

D. As their fourth specification, petitioners state:

"4. The order purports to grant an application which, under the Commission's regulations (particularly Section 1.72), should have been returned to the applicant as a defective application, and could not be considered or granted, the Commission having erroneously denied petitioners' motion to dismiss, filed September 30, 1939."

In reply, applicant states that:

1. Section 1.72 of the Rules of Practice and Procedure, to which petitioners refer, did not become effective until January 1, 1939. The instant application was filed in July, 1938, at which time the predecessor Rule, denominated Rule 104.1, provided as follows:

104.1. If an applicant, by specific request of the Commission, is required to file any documents or information not included in the prescribed application forms, a failure to comply therewith shall constitute a defect in the application, and the application will not

be considered by the Commission. Any application which is not filed in accordance with the Commission's regulations with respect to *the form used, manner of execution* and *completeness of answer to questions* therein required will not be considered by the Commission. Each such application shall be returned to the applicant by the secretary of the Commission. Each such application shall be returned to the applicant by the secretary of the Commission, together with a brief statement of the respect in which it is defective. (Italics supplied)

822 The instant application was filed on the proper form (Form 301); it was executed in the manner provided by the Rules and Regulations of the Commission; and all the questions were completely answered by the applicant. There was therefore, no violation of the applicable Rules in the filing of the instant application.

2. It was the practice of the Commission from its inception in August, 1934 to January 1, 1939, whenever an application was received that requested facilities not contemplated by the Rules of Allocation, to return such application to the applicant, inform him of the fact and advise him that, if he should desire a hearing on the application, the application should be resubmitted. The petitioners are well aware of this practice and have often taken advantage thereof. All but four of them filed, under Rule 104.1, applications for 500 kw operation. Such facilities were not contemplated in the Rules of Allocation. They were returned to them, they resubmitted them, and the applications were designated for hearing. They are still pending on the Commission's Docket. Can they thus take advantage of a Rule or Practice of the Commission when it serves their purpose or interests and, then, deny its existence or propriety when others do so to the alleged disadvantage of the Petitioners? The Rule and practice, above referred to, was not a special writ issued to petitioners as

princes of special privilege. It applied to all applicants, even the most humble.

3. The Commission, following its usual practice, returned the instant application on September 24, 1938,
823 and advised applicant that if it desired a hearing, the application should be resubmitted together with a request for hearing. The applicant did so on October 25, 1938. The Commission, in due course, designated the application for hearing on January 3, 1939.

4. It is clear that the instant application was not filed and prosecuted in violation of any Rule or Regulation of the Commission applicable thereto. The applicant complied with all the requirements of the Commission that were prerequisite to perfecting its statutory right to a hearing. To give retroactive effect to a later Rule and deprive applicant of this "fully blossomed" legal right, would be in the nature of *ex post facto* legislation. Surely, the petitioners can not countenance or suggest such an invasion of constitutional rights—or can they when it is to their advantage?

E. As their fifth specification, petitioners state:

"5. Under Section 409(a) of the Communications Act of 1934, the Commission has no power to effect a change in policy (including an amendment to its regulations or a new kind of use of frequencies, such as is involved herein) in a proceeding wherein the hearing was held and a record made before an Examiner."

In reply, applicant states that:

1. The order of the Commission amending Rule 3.25 and granting the application of WHDH does not constitute a change of policy. In the original Rules of Allocation forty cleared-channels were established. In

the thirteen years that have intervened since the
824 promulgation of those first Rules of Allocation, the Commission has reduced the number of cleared-channels to twenty-five and allowed duplication at night on fifteen of them. The Commission's policy through the years has been to duplicate cleared-channels at night if the public interest, convenience, and necessity would be served thereby. The instant order amending Rule 3.25 and the order granting the instant application are pursuant to and in conformity with this well-established policy of the Commission.

2. Even if it is assumed, for the purpose of argument, that the instant order constitutes a change of policy, within the meaning of Section 409(a) of the Communications Act, there has been no legal error in the instant proceedings. Section 409(a) cannot be interpreted to provide that where an examiner of the Commission has taken evidence on an application, which evidence might also be relevant to the consideration of Commission policy, the Commission is thereby precluded from changing the policy without a legislative hearing or from adding the facts thus obtained by the examiner to the Commission's fund of expert knowledge. It cannot be concluded that Congress intended any such absurd or unwise result.

3. Even if we assume, for the purpose of argument, that the examiner in this case did not have the power, under Section 409(a), to hold a hearing, administer the oaths, or take the evidence, all because the Commission later decided to amend Rule 3.25, the only effect would be to render the hearing on the application invalid—that is, there would have been no hearing on the application in the sense of the statute. Since the Com-
825 mission does not have to hold a hearing before it grants an application or hold a hearing before it amends a Rule, the invalidation of the hearing on the instant application could not legally bar the Commis-

sion from granting the application or amending the rule.

F. As their sixth specification, petitioners state:

"6. The amendment of Section 3.25 effected by the order is contrary to public interest, convenience, or necessity, in that it will result in (a) a degradation of broadcast service through interference, both on 850 kc and, eventually, on other frequencies, and will prevent or obstruct future improvement of such service, although such service is now grossly inadequate and improvement is badly needed; (b) a surrender of rights of the United States and of the listening public therein to the protection against interference from stations in other countries under the North American Regional Broadcasting Agreement; (c) unjust discrimination in favor of persons dwelling in cities already having stations and adequate broadcasting services and against persons in rural and sparsely settled areas and in small cities and towns having no stations of their own and having grossly inadequate broadcasting services; and (d) a violation of the requirements of Section 307(b) of the Communications Act of 1934 that the Commission, in its actions on applications, shall provide a fair, efficient and equitable distribution of radio service."

In reply, applicant states that:

1. Station KOA does not render interference-free service to any rural listeners in the eastern part of the United States. It would not even do so were it to increase its power to 500 kw or more so long as stations
826 WHAS, Louisville, Kentucky and CBL, Toronto, Canada, remain on the adjacent channels with equivalent operating power. The KOA interference-free service to this eastern area, which is the only area in which WHDH could possibly be a source of objectionable interference, is a wholly fictional thing and merely a part

of the cleared-channel myth that exists only in the minds of those who choose to ignore realities.

2. No useful rights will be surrendered by the United States under the North American Regional Broadcast Agreement as a result of the instant decision of the Commission. On the contrary, the only way the maximum use of the channel can be made, in accordance with our rights under that Agreement, is to make use of that frequency in those parts of the United States in which it is not now being used to render interference-free service and in which it has no future prospect of ever being so employed. Probably the petitioners intended and hoped that the North American Regional Broadcast Agreement would provide an unconquerable fortress against future invasion of their mythical domain of nationwide service. It is true, the Agreement, as finally effectuated, protected service that most of the cleared-channels do not render from foreign interference, all at the expense of the interference-free service that could be rendered by stations on local and regional channels. There is no room for WHDH and other stations similarly situated to obtain needed additional facilities except by using the frequencies assigned to and not usefully employed by KOA and other clear-channel stations. It appears that petitioners may
827 have been *too* clever and may be caught in the inevitable consequences of their own cleverness. An allegedly true story, carried to the extremes of unrealities, generally explodes in the face of the weaver of the tale.

3. There can result in the instant decision no unjust discrimination in favor of persons dwelling in cities and against persons in rural and sparsely settled areas. No rural listeners, who now obtain useful or needed service from KOA, will be deprived thereof by the effectuation of the instant decision of the Commission.

6. As their seventh specification, petitioners state:

"7. The order is arbitrary and capricious, and the findings of fact upon which it is based are not supported by substantial evidence, insofar as they have to do with the said amendment of Rule 3.25 and the granting of the application for unlimited hours of operation."

In reply petitioner states that:

1. The order of the Commission is not arbitrary and capricious because it is based upon the sound principles of public interest, convenience and necessity.

2. There is substantial evidence in the record to support the granting of the instant application.

3. The Commission's fund of expert knowledge bearing upon the wisdom of the amending Rule 3.25 is substantial and more than adequate to justify the amendment made by the Commission.

. . . . . .

832. *Request for Final Action Without Further Delay.*

This case has been pending before the Commission for almost three years. National Broadcasting Company and the Clear Channel Group have impeded its course by filing numerous pleadings and by availing themselves of every dilatory device. The points they have made have been argued and reargued under many guises. The major result of the long delay is that the people of the Boston area are being deprived of the public service which the Commission has found should be rendered by Station WHDH in the public interest, convenience and necessity. It is respectfully requested that these petitions be acted upon without delay and that no further stay be made of the Commission's final order.

WHEREFORE, Matheson Radio Company prays that (1) the Commission dismiss the petitions for rehearing of National Broadcasting Company, Inc., and Earle C. Anthony et al. (the Clear Channel Group) with prejudice, or (2) the Commission deny said petitions; and, upon the basis of the premises herein considered, the applicant respectfully requests that the Commission deny the petition of Berks Broadcasting Company for reconsideration and modification of order.

Respectfully submitted,

MATHESON RADIO COMPANY, INC.,

By: ANDREW G. HALEY,
Earle Building,
Washington, D. C.

W. THEODORE PIERSON,
Munsey Building,
Washington, D. C.

859 *Opposition to Petition for Stay During Appeal*

Comes Now the Matheson Radio Company, Inc., licensee of Radio Station WHDH, Boston, Massachusetts, and applicant in the above-entitled proceeding and files this opposition to the petition of the National Broadcasting Company, Inc. for an order staying the effectuation of the Commission's final order issued in the above-entitled proceeding on April 7, 1941.

The applicant's opposition to the aforesaid petition is based upon the following two propositions: (1) The Petition for Stay should be dismissed with prejudice, because the petitioner has no standing under the Communications Act of 1934, as amended, to take an appeal to the Court and, therefore, has no standing to file a Petition for Stay. (2) Assuming for the purpose of argument, that the petitioner has *locus standi* to appeal to the Court of Appeals, the Petition for Stay should be denied.

In support whereof, the applicant shows as follows:

I

A person having no standing to take an appeal to the Court for permanent or final relief has no standing to file a Petition for a stay order for temporary or interim relief. The petitioner does not have standing to take an appeal under the Communications Act of 1934 for the following reasons:

(1) Section 402 provides that appeals may be taken to the United States Court of Appeals for the District
860 of Columbia by (a) an applicant whose application has been denied and (b) by a person aggrieved or adversely affected by the final decision of the Commission.

(2) The petitioner is not an applicant whose application has been denied.

(3) The petitioner is not a person aggrieved or whose interest has been adversely affected by the final order issued by the Commission, for the following reasons:

(a) It is submitted that the aggrievement and the adverse affect contemplated by Section 402 (b) (2) of the Act must be interpreted as requiring a showing of substantial injury, which in turn can only manifest itself in the form of damage to the pecuniary or private business interests of the appellant. (*F. C. C.* v. *Sanders Brothers*, 309 U. S. 470; *Ground Radio Service* v. *F. C. C.*, decided February 3, 1941 by United States Court of Appeals for the District of Columbia.)

(b) In the course of this proceeding, the petitioner has filed, among other things, the following documents: two petitions to intervene, two petitions for stay, and one petition for rehearing. Each of the foregoing petitions were denied by the Commission. In none of those pleadings has the petitioner even alleged, much less shown, that it would suffer any damage to its pecuniary or private-business interests as a result of the final order of the Commission issued in the instant case. The instant petition against
861 which this opposition is addressed fails utterly in that important respect.

(c) The failure of the petitioner to show its standing to appeal under the Communications Act of 1934 in its petition for stay order is fatal and the petition should be dismissed with prejudice.

II.

Assuming, for the purpose of argument, that the petitioner does have *locus standi* to take an appeal to the United States Court of Appeals for the District of Columbia, the petition should be denied on its merits. A stay order should only issue in cases where the petitioner therefor has conclusively shown, first, that the public interest is not injured thereby, and second, that the injury to the private interests of the petitioner resulting from failure to stay the order will greatly exceed the injury of the private interests of others that will result from the issuance of the stay order. The instant petition fails utterly to furnish any such foundation for the relief it prays. That failure is fatal *per se*. Moreover, a further examination of the various interests involved in the instant case conclusively shows that there can be no basis in this proceeding for the issuance of the stay order.

(1) The Commission in its proposed findings, in its final decision and in its decision on the petition for rehearing, filed by the instant petitioner, determined that the public interest, convenience, and necessity would be served by the granting of the instant application and the amendment of Rule 3.25. In its petition for rehearing, which the petitioner incorporates as a part of its petition for stay, the specification of error did not include any allegation that the public interest would not be served by the granting of the instant application or the amendment of the Rule. The said specifications were devoted entirely to alleged
862 procedural errors by the Commission in arriving at its decision. The petitioner, then, has never controverted the final decision of the Commission that the public interest, convenience and necessity would be served by the

granting of the application and the amendment of Rule 3.25. To delay for a substantial period of time, as the instant petition anticipates, service which the Commission found to be in the public interest, would be substantial injury to the interest of the public and no private interests of any person or persons are sufficient, in law, to occasion that injury.

(2) Even assuming, for the purpose of argument, that the factors of public interest in this case are inconsequential or in favor of the petitioner, there are no facts upon which the petitioner could base an allegation of substantial injury to its pecuniary or private business interests. The petitioner's failure to allege such injury is eloquent evidence of the absence thereof. It would be absurd to contend that the rates or the revenue of KOA would be adversely affected by interference in its "poor" and "occasional" secondary service area. It would be fantastic in the extreme for the petitioner to maintain that even an infinitesimal part of the rate paid by any advertiser for KOA has been for communication with listeners in these very remote "poor" and "occasional" secondary service areas. Particularly is this true when it is realized that petitioner's network advertisers buy, simultaneously with KOA, time from two to nine other Class I stations, which give these remote listeners good and satisfactory secondary service or primary service. Applicant is informed and believes that an examination of the "before and after"
863 rates or revenues of stations that in the past have been reduced from so-called Class I-A status to so-called Class I-B status will show that such changes have not caused them to reduce rates or lose revenue. It is clear that, even if one tries to make out the case which the petitioner so miserably failed to make for itself, it is impossible to find any factual or reasonable basis for expected injury to the pecuniary or private business interests of the petitioner.

(3) On the other hand, the applicant is informed and believes that the loss of revenue to the applicant by delaying

its nighttime operation will amount to between $5,000.00 and $7,000.00 per month. This injury to the private interests of the applicant that would result from the delay sought by the petitioner is substantial and should not be inflicted upon the applicant without cause or justification. That cause or justification, as heretofore shown, does not exist either in the form of injury to the public interest or injury to private interests of the petitioner.

(4) To summarize, the issuance of the stay order, requested by the petitioner, would result in substantial injury to the public interest and to the private interests of the applicant and would not serve to avoid injury to the private interests of the petitioner, because the possibility of such latter injury is non-existent.

III

While the point was not specifically made by the petitioner, the applicant does wish to discuss the effect of the final decision of the Commission upon this Government's rights under the North American Regional Broadcast Agreement, together with the questions as to whether
864 the issuance of a stay would serve in any manner to protect and preserve any substantial rights of this Government.

A. Station KOA was reported by this Government to the signatories of the Havana Treaty as a Class I-A station. As such it is entitled to the protection accorded Class I-A stations under that agreement, which requires, *inter alia*, that all stations operating in other countries at night shall be at least 650 miles removed from the nearest border of the United States. While applicant concedes that it will be necessary for the United States Government at the appropriate time, to notify the signatories of the North American Regional Broadcast Agreement that Station WHDH has changed its operation from limited to unlimited time, it does not concede that the Treaty requires the United States Government to change the classification of Station

KOA, under the aforesaid agreement, for the following reasons:

(1) Part II, Section C. (1) of the North American Regional Broadcast Agreement defines a Class I-A station as follows:

"A Class I station which operates with power of 50 kw or more and which has its primary service area, within the limits of the country in which the station is located, free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area, within the same limits, free from objectionable interference from stations on the same channel, in accordance with the engineering standards hereinafter set forth."

(2) Part II, Section A. (6) of the Treaty defines objectionable interference as follows:

"Objectionable interference is the degree of interference produced when, at a specified boundary or field intensity contour with respect to the desired station, the field intensity of an undesired station (or the root-mean-square value of field intensities of two or more stations on the same frequency) exceeds for ten percent or more of the time the values hereinafter set forth in this agreement."

(3) Part II, Section D. (2) of the above-mentioned Treaty provides, *inter alia*, as follows:

"The boundaries or contours at and within which the several classes of stations shall be protected from objectionable interference are as set forth in Appendix II. No station, however, need be protected from objectionable interference at any point outside the boundaries of the country in which such station is located."

(4) Part II, Section D, (3) of the aforesaid Treaty provides as follows:

"Objectionable interference shall be deemed to exist to a station when, at the boundary or field intensity contour specified in Appendix II with respect to the class to which the station belongs, the field intensity of an interfering

station (or the root-mean-square value of the field intensities of two or more interfering stations) operating on the same channel exceeds for ten percent or more of the time the value of the permissible interfering signal set forth opposite such class in Appendix II."

(5) Appendix II, Table I, with reference to Class I-A stations, provides that they shall be protected from interference *day* and *night*, within the boundary of the
866 country in which the station is located, from an interfering signal having a value in excess of *5 microvolts during the daytime and 25 microvolts during the nighttime.*

(6) It is submitted that the foregoing provisions of the Treaty cannot reasonably be interpreted to refer to interference to Class I-A stations that results from stations operating within the boundaries of the country in which the Class I-A station is located. If they are so construed, Station KOA has never qualified as a Class I-A station and should not have been so reported, because the daytime and limited time operations of Stations WRUF, WHDH, KFUO, and WEEU radiate signals during daytime, within the boundaries of the United States, exceeding the value of 5 uv/m. If the Treaty is interpreted as preventing domestic assignments that exceed the interference values set out in Appendix II, Table I, then no daytime or limited time operations should be permitted on KOA's channel. There is no basis in the Treaty to distinguish between interfering signals caused by domestic stations during nighttime and interfering signals caused by domestic stations during the daytime. The Treaty treats both instances in the same manner, as a reference to Appendix II, Table I conclusively shows. It is submitted that the only reasonable interpretation of the Treaty is that it provides against interference from foreign stations only and does not circumscribe or circumvent the discretion of the United States Government, through the Federal Communications Commission, in making allocations to frequencies within its

own boundaries in the manner that it determines the public interest, convenience and necessity to demand.

867 (7) In the event of either interpretation, however, we must reach this dilemma with respect to the instant situation:

(a) If the Treaty prevents assignment of domestic stations to Class I-A frequencies that contravene the provisions of Appendix II, Table I, then, the classification of Station KOA must be changed whether or not the order in the instant case ever becomes final, or

(b) If the Treaty is interpreted as not preventing the domestic assignments to domestic Class I-A frequencies that will cause interfering signals in excess of that provided in Appendix II, Table I, then, the increase in hours of operation to Station WHDH furnishes no basis for a change in the present notification on KOA.

(8) It must be concluded, therefore, that the instant decision does not, *per se*, require a notification by this Government to the other Treaty signatories that the classification of Station KOA has been changed from Class I-A to Class I-B. By the same token, the instant decision cannot be regarded as proximately or remotely causing any real or imaginary injury to the rights of this Government, under the North American Regional Broadcast Agreement. It is submitted that the only notification required by the Treaty is that Station WHDH is operating unlimited time on the frequency 850 kc with 5 kw power. This notification will not give to the other Treaty signatories any greater or further rights than they already have under the notification already given by this Government with respect to this frequency.

(9) It is interesting to note that the Dominion of Canada, one of the signatories to the North American Broadcast Agreement, has obviously interpreted the

868 agreement as not preventing or circumscribing the discretion of that Government in making domestic assignments. In their official notification, which was pub-

lished by the Federal Communications Commission, the Canadian Government assigned to the frequency 1010 kc, Station CFCN, at Calgary, Alberta, with the power of only *10 kw* and with the classification of *I-A*. To the same frequency it assigned CBY to operate with 1 kw power, *unlimited time*. It is obvious from this assignment that the Canadian Government does not interpret the Treaty as preventing it from duplicating at night the stations on the Clear Channel frequencies for which I-A classifications have been given. It is equally obvious that they do not interpret the Treaty as requiring the Canadian Government to require Class I-A stations to operate with 50 kw or more power.

B. Applicant requests that the Commission take notice of the present war emergency and its effect upon the availability of the materials for the construction of stations. The present market for certain materials and instruments needed in the construction proposed by the applicant is becoming more and more contracted as a result of National Defense demands. It is only logical to believe that in the very near future the market is going to contract considerably more. To delay the applicant in the construction of this station may, as a result of the fact that construction materials and instruments are becoming increasingly unavailable, delay the final construction of this station until sometime after the present war emergency ceases to exist. Such protracted and prolonged delay will greatly injure the public interest and the demands of our National Defense for adequate communication facilities. For that reason, if for no other, the operation which the Commission in its decision on this application has found to be in the public interest, should be consummated at the earliest pos-
869 sible date. This is especially true when the case made by the petitioner is, on its face, so completely lacking in merit.

On the foregoing premises, it is requested that the Commission dismiss the Petition for Stay, or in the alternative, deny the Petition for Stay.

Respectfully submitted,

MATHESON RADIO COMPANY, INC.,

By W. THEODORE PIERSON,

ANDREW G. HALEY.

IN

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 7933

NATIONAL BROADCASTING COMPANY, INC.
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION
Appellee

NOTICE OF INTENTION TO INTERVENE.

Comes now Berks Broadcasting Company, a Pennsylvania corporation, by its attorney, George O. Sutton, and pursuant to Section 402 (d) of the Communications Act of 1934, states that it is an interested party and is entitled to participate in the proceedings on the above-styled appeal and hereby gives notice of its intention to intervene therein for the reasons hereinafter given.

BERKS BROADCASTING COMPANY,

By: GEO. O. SUTTON,
1038 National Press Building,
Washington, D. C.

June 27, 1941.

VERIFIED STATEMENT OF INTERVENER'S INTEREST.

District of Columbia, City of Washington, ss:

George O. Sutton, being first duly sworn, states that he is attorney for Berks Broadcasting Company, licensee of Radio Station WEEU, Reading, Pennsylvania, and that notice of intention to intervene in the above-styled appeal has been duly filed, and that intervener's interest is as follows:

1. Matheson Radio Company, Inc. (WHDH) by a decision of the Federal Communications Commission rendered March 26, 1941, effective April 7, 1941, was granted a construction permit to operate unlimited time on the frequency of 850 kilocycles with power of 5 kilowatts at Boston, Massachusetts. Intervener participated in the hearing and oral argument before the Federal Communications Commission in this proceeding. In its decision on said proceeding the Federal Communications Commission in granting the application of Matheson Radio Company, Inc. (WHDH) further ordered that Rule 3.25 (a) be amended so as to permit duplicate nighttime operation on the frequency of 850 kilocycles, nighttime operation on said frequency having been theretofore limited to Radio Station KOA, Denver, Colorado. In its notice of appeal and reasons therefor, appellant requests that said decision and order of the Federal Communications Commission be reversed. Intervener's Radio Station WEEU operates on the aforementioned frequency of 850 kilocycles daytime only and has pending an application to operate unlimited time on said frequency. A reversal of the aforementioned decision of the Federal Communications Commission, as requested by appellant, would result in Rule 3.25 (a) being restored to its original status, thus preventing duplicate nighttime operation on the frequency of 850 kilocycles and would thus prevent the grant of intervener's aforementioned application which is now pending before the Federal Communications Commission.

GEORGE O. SUTTON.

Subscribed and sworn to before me, a Notary Public, in and for the District of Columbia, this 27th day of June, 1941.

HAZEL RAY SMITH,
Notary Public.

My Commission expires February 14, 1943.

ACKNOWLEDGMENT OF SERVICE.

Receipt of a true copy of the foregoing "Notice of Intention to Intervene" is acknowledged this 27th day of June, 1941.

NATIONAL BROADCASTING COMPANY, INC.

By: P. J. HENNESSEY, JR.

FEDERAL COMMUNICATIONS COMMISSION,

By: TELFORD TAYLOR.

By MMC

181 In United States Court of Appeals for the District of Columbia

NATIONAL BROADCASTING COMPANY, INC., APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

and

MATHESON RADIO COMPANY, INC., BERKS BROADCASTING CO., INTERVENORS

Minute entry of argument and submission

Jan. 6, 1942

The argument in the above entitled cause was commenced by Mr. Duke M. Patrick, attorney for appellant, continued by Mr. Telford Taylor, attorney for appellee, and concluded by Mr. Duke M. Patrick, attorney for appellant. Appellee allowed to file memorandum.

182 In United States Court of Appeals for the District of Columbia

Before Honorable D. Lawrence Groner, Chief Justice, and Honorable Justin Miller, Fred M. Vinson, Henry W. Edgerton, and Wiley Rutledge, Associate Justices.

NATIONAL BROADCASTING COMPANY, APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

and

MATHESON RADIO COMPANY, INC., BERKS BROADCASTING CO., INTERVENORS

Minute entry of reargument and submission

June 13, 1942

The Court announced that Mr. Justice Stephens was ill and would be unable to hear the oral argument, but that, if agreeable to counsel for the respective parties, and they so stipulated in writing, the case would be treated as submitted to Mr. Justice Stephens on the record and briefs for consideration and decision with the Judges hearing the oral argument. Thereupon, counsel for each of the parties orally signified their agreement to the submission proposed, and the Court directed that a written stipulation to that effect be filed by the parties. A written stipulation thereafter was filed with the Clerk.

By leave of Court, Mr. W. Theodore Pierson, for the Intervenor Matheson Radio Company, Inc., submitted a motion for leave to file supplemental affidavits, and there being no objection thereto by the other parties, the same was granted.

Reargument in the above entitled cause was commenced by Mr. Duke M. Patrick, attorney for appellant, continued by Messrs. Telford Taylor for appellee, and W. Theodore Pierson, attorney for the Intervenor Matheson Radio Company, Inc., and concluded by Mr. Duke M. Patrick, attorney for appellant. Upon inquiry of Mr. Justice Edgerton if a copy of the license was in the record, Mr. Telford Taylor stated it was not but that he would furnish copies. Thereupon, the Chief Justice announced that the Court would consider the case submitted to the Court of six Judges.

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7933

NATIONAL BROADCASTING COMPANY, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

and

MATHESON RADIO COMPANY, INC., AND BERKS BROADCASTING COMPANY, INTERVENORS.

Appeal from the Federal Communications Commission.

On Reargument

Decided September 12, 1942.

Mr. D. M. Patrick, with whom *Mr. Philip J. Hennessey, Jr.*, was on the brief, for appellant.

Mr. Telford Taylor, General Counsel, Federal Communications Commission, with whom *Mr. Thomas E. Harris*, Assistant General Counsel, and *Messrs. Harry M. Plotkin* and *Daniel W. Meyer*, Counsel, were on the brief, for the Federal Communications Commission. *Messrs. Charles R. Denny, Jr.*, and *Benedict P. Cottone* also entered appearances for the Federal Communications Commission.

Mr. W. Theodore Pierson, with whom *Mr. Andrew G. Haley* was on the brief, for Matheson Radio Company, Inc., Intervenor.

Messrs. Arthur H. Schroeder and *Geo. O. Sutton* filed a brief on behalf of Berks Broadcasting Company, Intervenor.

Before GRONER, Chief Justice, and STEPHENS, MILLER, VINSON, EDGERTON, and RUTLEDGE, Associate Justices.

Opinion

RUTLEDGE, J. The appeal is from an order of the Commission entered April 7, 1941. The applicant (Matheson Radio Company, Inc.) operates Station WHDH at Boston, Massachusetts, and is intervenor here. Appellant operates Station KOA at Denver, Colorado, upon the same frequency, 830 kc, now 850 kc under the North American Regional Broadcasting Agreement. The order authorized increases in power and time for WHDH. Appellant claims it is aggrieved and its interests are adversely affected by the order. Hence it asserts both a right of appeal and one to hearing by the Commission, which denies both. The principal questions are therefore whether, on the showing made, (1) appellant has standing to appeal; (2) the Commission acted arbitrarily or erroneously in refusing to permit it to intervene as a party in the administrative proceedings.

KOA is a Class I station, operating since 1928 on a clear channel with 50 kw power.[1] By virtue of this classification it was the only

[1] Under Sections 3.22 and 3.25 of the Commission's Rules and Regulations, the following provisions concerning clear channel stations are made:

"§ 3.22 *Classes and power of standard broadcast stations.*—(a) *Class I station.* A Class I station is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable

station operating on its frequency at night prior to the order now in question. From 1930 WHDH had been a 1 kw station operating daytime only until sunset Denver time. The order modified its license to permit operation for unlimited time and with 5 kw power. No formal or literal modification was made in KOA's license, but modifying the license of WHDH created electrical interference after sunset in KOA's secondary service. Roughly the region affected is that lying 700 miles or more east of Denver. To accomplish this change, the Commission had to transfer the frequency 850, on which both stations operate, from subdivision (a) to subdivision (b) of Section 3.25 of its rules.[2] Accordingly the order provided for this transfer.

The substantive injury of which appellant complains consisted therefore in creating new and additional electrical interference, affecting its secondary service area; degrading the status of Station KOA from a clear channel station by reclassifying it; and, in effect though not in terms, modifying its license in these respects. As appears below, appellant also asserts these changes not only affected its interests substantially and adversely, but had like effect upon the public interest, in depriving listeners within the secondary service area of its service and also in jeopardizing the status of this frequency under the North American Regional Broadcasting Agreement.[3]

The substantive injuries however, both to appellant and to the public, are set forth primarily not to secure substantive redress in this appeal, but (1) to establish appellant's standing to appeal; and (2) to show that appellant had a right to intervene in the Commission's pro-

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interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in § 3.25 or in accordance with the 'Engineering Standards of Allocation' at page 2756. The operating power shall be not less than 10 kw nor more than 50 kw (see also § 3.25 (d) for further power limitation)."

"§ 3.25 *Clear channels; class I and II.* The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given:

"(a) To each of the channels below there will be assigned one Class I station and there may be assigned one or more Class II stations operating limited time or daytime only: 640, 650, 660, 670, 700, 720, 740, 750, 760, 770, 800, 810, 820, 830, 850, 860, 870, 980, 1,000, 1,070, 1,000, 1,130, 1,150, 1,170, and 1,190 kilocycles. The power of the Class I stations on these channels shall not be less than 50 kw.

"(b) To each of the channels below there may be assigned Class I and Class II stations: 680, 710, 790, 970, 1,020, 1,040, 1,050, 1,060, 1,080, 1,100, 1,110, 1,140, 1,160, 1,180, 1,460, 1,470, 1,480, and 1,490 kilocycles. Code of Fed. Rm. (Supp. 1939) 2742, 2744.

[2] See note 1 *supra*. Various contentions made with reference to this change, as being one in policy, "legislative" or "judicial" in character, made upon hearing before an improper official, *i. e.*, an examiner, etc., are not considered herein, since other and more important issues are sufficient to dispose of the appeal.

[3] Par. B, 8 (d) of Part II of this treaty provides: "If within the period of this Agreement the country to which a clear channel has been assigned shall have made use of the channel but not in the manner above described or not to the extent required by the provisions of this Agreement, such country shall be considered as having relinquished that portion of the rights which it has not used and at the expiration of this agreement, the other countries party thereto shall have the right, if they see fit, to withdraw the unused privileges from such country and to reassign them to any or all of the other interested countries.

ceedings of which it has been deprived either arbitrarily or erroneously. The case therefore raises again the troublesome question concerning who is entitled to appeal from the Commission's orders and upon what showing, under the nebulous provisions of the statute in this respect;[4] and the equally difficult, perhaps more unsettled inquiry, who, if anyone, may intervene as of right in its proceedings for granting, denying or modifying a license under the equally cloudy provisions relating to these matters.

I. *The Right to Appeal*

Appellant has standing to appeal. The statute confers this upon a "person aggrieved or whose interests are adversely affected." Section 402 (b) (2). In *F. C. C.* v. *Sanders Brothers Radio Station*, 309 U. S. 470 (1940), the Supreme Court held that the licensee of a competing station likely to be financially injured qualifies for appeal. It went further and asserted that Congress "*may have been* of opinion that one likely to be *financially* injured by the issue of a license would be the *only* person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license." (Italics supplied.) "Financially" was inserted by amendment of the opinion after the decision was first handed down. It does not follow that this guarded and speculative dictum makes economic injury the sole criterion of status to appeal, as the Commission and WHDH contend. The *Sanders* case involved on its facts only financial injury. The court held that sufficient. Though it suggested the possible insufficiency of other kinds of injury, no question concerning them was before it. The decision therefore cannot be taken as deciding such an issue.

There are strong reasons why the dictum should not be accepted as either stating or forecasting the law. Nothing in the statute specifies or requires a showing of financial injury as the exclusive basis to appeal. Nor are the hypotheses tenable that such injury is the only sort, of a substantial kind, likely to occur or that only persons financially hurt will be able or likely to appeal. It is true they probably will have the financial resources necessary for litigation. It does not follow that others, who may be affected adversely though not financially, will be neither willing nor able to appeal.

The contrary assumption ignores the facts that radio broadcasting is not exclusively a matter of business or financial gain, and that it is the public interest, not the private right, which is primarily at stake upon the appeal. Unfortunately, commercial enterprise has taken over the lion's share of the field. Unfortunately, because, when radio was in its infancy, many persons hoped that much of its work would be done by educational, religious and eleemosynary institutions, more than the event has permitted. Notwithstanding the policy which has

[4] The question has been presented here and in the Supreme Court in numerous cases. *E. g.*, Sanders Bros. Radio Station v. F. C. C., 70 App. D. C. 297, 106 F. (2d) 321 (1939), *rev'd on other grounds*, 309 U. S. 470 (1940); WOKO, Inc. v. F. C. C., 71 App. D. C. 228, 109 F. (2d) 665 (1940); Yankee Network, Inc. v. F. C. C., 71 App. D. C. 11, 107 F. (2d) 212 (1939); Stuart v. F. C. C., 70 App. D. C. 265, 105 F. (2d) 788 (1939); Pittsburgh Radio Supply House v. F. C. C., 69 App. D. C. 22, 98 F. (2d) 303 (1938); Red River Broadcasting Co. v. F. C. C., 69 App. D. C. 1, 98 F. (2d) 282 (1938), *cert. denied*, 305 U. S. 625 (1938); Pulitzer Pub. Co. v. F. C. C., 68 App. D. C. 124, 94 F. (2d) 249 (1937).

so favored commercial operators, there is a considerable volume of noncommercial broadcasting. It takes place through stations supported not by advertising or "plugs," but by churches, universities, colleges, charitable foundations and others who have no profit-making revenues. Many still hope that the evils apparently inherent in commercial broadcasting yet may bring about a larger allocation of frequencies to licensees whose objects are not primarily the making of money.

Limiting appeals to persons financially injured would have the practical effect of denying them to nonprofit-seeking broadcasters. Conceivably, in very rare instances, such operators could show financial injury. But obviously they could not do so in the circumstances in which commercial stations are able most frequently to demonstrate its possible incidence. The view cannot be accepted that these stations can appeal only when some action of the Commission has the practical effect of destroying their capital investment. Such a view would not be consistent with the public interest and right which is the foundation of all broadcasting and which primarily the commercial broadcaster's appeal is designed to protect. *F. C. C.* v. *Sanders Bros., supra.* The latter is likely to utilize the public interest as a vehicle for protecting his private standing, however tentative that may be in legal status. Few business institutions rush to the defense of the public weal when they are not affected in any private way. As between such operators, therefore, and the noncommercial broadcaster, the latter cannot be held a knight unworthy, unable or unwilling to battle for the general good in the lists of appellate litigation. Congress had no intention to exclude nonprofit stations from taking appeals, either absolutely or in practical effect. And if they can appeal by showing other than financial injury, so also can commercial operators.

Absence of economic injury however does not amount to presence of other sufficient injury. Appellant asserts it is enough that the order creates electrical interference. This the Commission now denies, in reversal of its apparent position prior to the *Sanders* decision.[5] Appellant argues that electrical interference, regardless of amount or effect, creates the right of appeal. To support this it points out that the whole occasion for regulation, including the feature of license, arises from the limited number of frequencies and the chaos electrical interference would cause, indeed did cause,[6] if there were no authority vested with power of license, allocation and police.

It is not necessary, however, to go so far with appellant. In the present stage of radio, very few changes, either in frequency or in power, can be made without creating some degree of electrical interference. This may range from minute and practically harmless interruption with remote and very occasional listeners in secondary ser-

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[5] The controversy in that case, and previously, concerning Section 402 (b)(2) was with reference to whether financial injury was sufficient, it being apparently the Commission's position that injury from electrical interference was the most that Congress had in mind in enacting this section.

[6] Prior to the Radio Act of 1927, and following the decision in United States v. Zenith Radio Corp., 12 F. (2d) 614 (N. D. Ill. 1926), and the Attorney General's opinion, Ops. Att'y Gen. (1926) 126. See Monograph of the Attorney General's Committee on Administration Procedure, Part 3, Federal Communications Commission (1940) 83.

vice areas to total obliteration in the primary field. Notwithstanding the Commission's apparently contrary view,[7] the latter effect would appear to be more than sufficient for appeal, whether or not a showing of financial injury could be made. Likewise, at the other end, it seems doubtful that an infinitesimal amount of new electrical interference should create standing to appeal.

Presumably by the decision in the *Sanders* case the Supreme Court intended that the financial injury must be something more than nominal or highly speculative. It seems not unreasonable to read the opinion as requiring by implication that there be probable injury of a substantial character. So much by way of limitation seems necessary to prevent vindication of the public interest from turning into mass appeals by the industry at large, with resulting hopeless clogging of the administrative process by judicial review. Likewise, with electrical interference, it is hardly necessary to secure appellate championship by every broadcaster who may be affected in only a remote and insubstantial manner. It follows that electrical interference, without a showing of financial injury, may be sufficient to create standing to appeal. But for this purpose there must be a reasonable possibility that it will be substantial. And this must appear, as we have held, from the notice of appeal and statement of reasons. *Yankee Network, Inc.* v. *F. C. C.*, 71 App. D. C. 11, 107 F. (2d) 212 (1939).

In this case the notice sufficiently discloses appealable interest. It states that appellant is aggrieved and its interests are adversely affected by the order and by its reaffirmance on denial of appellant's petition for rehearing; sets forth in detail the nature and steps of the proceedings before the Commission; and states, among reasons relied upon, that the order:

"(a) Results in *a substantial* modification of the license held by appellant . . . without having afforded it an opportunity to be heard as required by Section 312 (b) of the Communications Act of 1934." (Italics supplied)

"(b) Results in a change in the class and character of the frequency . . . without consent or hearing as required by Section 303 (f)."

"(c) Results in a degradation of service on 830 kc (850 kc) which will be prejudicial to the priority rights of the United States on this channel under Paragraph B 8 (d) of Part II of the North American Regional Broadcasting Agreement without affording appellant an opportunity to be heard on its own behalf and on behalf of the listeners it serves."

"(d) Results in a discrimination against service to rural listeners in order to furnish additional service to the residents of the City of Boston and as such is violative of the requirements of Section 307 (b) of the Communications Act of 1934."

Other assigned reasons include assertedly improper procedures in changing Commission policy, failure to return the application as required by its rules, amendment of the rules under improper notice, insufficiency of the evidence to support the decision, denial of hearing according to due process of law, etc.

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[7] The Commission's position that only financial injury, whether or not resulting from electrical interference, is sufficient for appeal necessarily means that electrical interference without financial injury, regardless of the extent or effect of the interference, would be no basis for appeal. Generally, of course, extensive interference would cause financial injury. But it is not clear this would be true of nonprofit stations or necessarily, perhaps, always in other cases.

On its face, therefore, the notice charges that the order substantially modified the license of KOA, changed the class and character of its frequency, degraded the station's service under the North American Agreement; jeopardized thereby not only appellant's rights but the priority rights of the United States and therefore the interests, present and future, of the listening public, and created discrimination against rural and in favor of urban listeners contrary to statutory requirements. These reasons appear to be a sufficient showing of both private and public interest and of adverse affectation to sustain the appeal. They require that it be considered on the merits, that is, on the question whether appellant was wrongfully refused a hearing before the Commission.

II. *The Right to Hearing*

The extent of the conflict concerning intervention appears from the extreme positions taken by appellant, on the one hand, that such a right arises from the Fifth Amendment as a matter of due process of law, and by the Commission and WHDH, on the other, that Congress has given the former an absolute discretion which nothing in the Constitution inhibits or limits.

It is said that existence of a right of appeal presupposes a right to intervene. The statute does not expressly so provide. But in view of our conclusion, for reasons to be stated, that appellant was entitled to intervene, it is not necessary to decide whether in some unusual circumstance one not entitled to become a party might appeal.

On the other hand, the Commission's argument is untenable that appellant has no right to be heard because it has no vested right in the frequency, or in its license or status thereunder, *F. C. C.* v. *Sanders Bros., supra,* or because the statute empowers the Commission to make rules and regulations, Section 154 (i), and to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Section 154 (j). The fallacy is that one who has no such vested right has therefore no procedural protections in relation to the more tenuous rights, privileges or status he possesses.[8] Whatever its proper label, "qualified right," "privilege," "status," "licensee," appellant acquired something of value by virtue of its license and the statute. The label is not important. The fact that appellant has fulfilled statutory conditions and has received statutory advantages, status and protections is important. *Tutun* v. *United States,* 270 U. S. 568 (1926). That it may be deprived of these and that the Commission has discretion to take them away, wholly or in part, do not mean that it can do so in an unfair manner or without hearing.[9] The protections of procedural due process do not disappear because the substantive right affected is not a full-grown vested right like that in one's castle at the common law. The right of appeal in capital criminal cases is entirely statutory. But that does not put it entirely beyond constitutional limitation. *Cf. Boykin* v. *Huff,* 73 App. D. C. 378, 121 F. (2d) 865 (1941), and au-

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[8] See Davis, *The Requirement of Opportunity to be Heard in the Administrative Process* (1942) 52 YALE L. J. 1093, 1118-25, and authorities cited and discussed therein.

[9] *Ibid.*

thorities cited. Similarly, though statutory rights in the nature of occupational license, revocable in administrative discretion, may not be "property" for purposes of protections afforded by substantive due process, they are not unguarded against arbitrary administrative action.[10] Procedural due process protects them against this, and does so notwithstanding the broad rule-making power and discretion given the Commission concerning the manner of conducting its business.

The crucial issue therefore comes down to whether appellant has been deprived of an opportunity for a fair hearing to which it was entitled either by the statute or by elementary due process. The two prongs of the question may be considered together. It will aid first to set forth the statutory provisions concerning hearing and those provided by the Commission's Rules and Regulations which are pertinent both to hearing and to intervention. These then may be considered in the light of what was done by appellant and the Commission.

A. The Statutory Provisions and Scheme of Hearings

Provisions concerning hearings are contained in Sections 309 (a), 303 (f), 312 (a), (b), and 409 (a) of the Act,[11] in addition to Section 154 (i), (j) referred to above.

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[10] *Ibid.*

[11] 48 STAT. 1082, 1085, 1086-7, 1096 (1934), 47 U. S. C. §§ 303 (f), 309 (a), 312 (a), (b), 409 (a) (1941).

§ 303 (f). "Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however*, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with."

§ 309 (a). "If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

§ 312 (a). "Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this chapter or of any regulation of the Commission authorized by this chapter or by a treaty ratified by the United States: *Provided, however*, That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation."

Section 309 (a) relates to applications for license, for renewal and for modification. The Commission is authorized to issue, renew or modify the license if, *upon examination of the application*, it determines that public interest, convenience or necessity would be served by *granting* it. If it does not reach *such* a decision on examining the application, then it must set the matter for hearing, "notify *the applicant* . . . and afford *such applicant* an opportunity to be heard under such rules and regulations as it may prescribe." (Italics supplied)

Under Section 303 (f) the Commission is authorized to "make such regulations *not inconsistent with law* as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act," but with the proviso that "*changes in the frequencies, authorized power, or in the times of operation* of any station shall not be made without the consent of *the station licensee* unless, *after a public hearing*, the Commission determines that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with. . ." (Italics supplied) These are the most important provisions presently involved.

Section 312 (a), (b) requires hearing with notice to the station licensee when revocation or modification of license is proposed. In the case of modification the licensee is to be "given reasonable opportunity to show cause" why the order should not issue, after having notice in writing.

By Section 409 (a) a commissioner or examiner or the director of a division is empowered, when designated by the Commission, to hold hearings, except an examiner may not do so in administration of Title III with respect to a matter involving: "(1) a change of policy by the Commission, (2) the revocation of a station license, (3) new devices or developments in radio, or (4) a new kind of use of froquencies. In all cases heard by an examiner the Commission shall hear *oral arguments* on request *of either party.*" (Italics supplied)

As has been noted, Section 154 (i), (j) confers broad power upon the Commission to make rules and regulations, issue lawful orders and determine the manner of conducting its business.

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§ 312 (b) "Any station license after June 19, 1934, granted under the provisions of this chapter or the construction permit required hereby and after such date issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

§ 409 (a). "Any member or examiner of the Commission, or the director of any division, when duly designated by the Commission for such purpose, may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Commission; except that in the administration of sections 301-362 of this title an examiner may not be authorized to exercise such powers with respect to a matter involving (1) a change of policy by the Commission, (2) the revocation of a station license, (3) new devices or developments in radio, or (4) a new kind of use of frequencies. In all cases heard by an examiner the Commission shall hear oral arguments on request of either party."

Before turning to the regulations we may note that Section 309 (a) does not *in terms* guarantee an applicant or anyone else a hearing in all cases. The matter may be determined upon examination of the application, if in that manner the Commission is able to conclude that the application should be *granted*. In other words, the applicant is not entitled to a hearing if the action is to be in his favor. On the other hand, if the Commission cannot decide for him by merely examining the application, it must afford *him* a hearing with due notice. In short, it cannot deny the application without a hearing and the applicant is a necessary party. Whether other persons who may be affected, including existing licensees, are or may be entitled to a hearing is not determined explicitly or perhaps implicitly by this section. It is primarily an applicants' section and deals chiefly, though not necessarily exclusively, with applicants' rights.

Section 312 (a) (revocation), (b) (modification), on the other hand, deals primarily with rights of existing licensees. Hearing on notice is prescribed. When the question is modification *the licensee* must be given "reasonable opportunity to show cause" why the order should not issue. When it is revocation the hearing is to be "conducted under such rules as the Commission may prescribe." In contrast with Section 309 (a), Section 312 deals expressly and therefore primarily, not with applicants and their rights, but with licensees and their rights. Under the one applicants cannot be affected adversely without a hearing; under the other licensees cannot be so affected by revoking or modifying the license without a hearing. Neither section purports to make the hearing provided *ex parte* or to limit it in the one case to applicants, in the other to licensees. But neither purports to bring in others or give them a right to come in. Though others are not expressly excluded, the theory seems to be in each instance that the hearing is principally, though not necessarily exclusively, for the benefit of the applicant in the one case, of the licensee in the other. Neither section is designed on its face explicitly to take care of the situation where the interests of an applicant and an existing licensee, or of two licensees clash or may do so.

Section 303 (f) is in terms, particularly of the proviso, much like Section 312 (a), (b), in that it provides expressly for public hearing concerning "changes in the frequencies, authorized power, or . . . times of operation," unless "the station licensee" consents to the change. It is not stated explicitly that he is entitled to notice and participation in the hearing, but that seems clearly implied from the provision for hearing and prohibition of these changes without it unless he consents. Furthermore, the section contains no explicit statement concerning notice to or participation by any other person. On its face therefore the provisions of Section 303 (f) concerning hearing and the licensee's participation are much like those of Section 312 (b) dealing with modification, though in terms they are not entirely identical.[12] In a broad sense both may be said to deal with

[12] Section 312 (b) is cast in terms of notice and "to show cause," specifying that notice be given the operator whose license is to be modified. Section 303 (f) has no express provision for notice and merely requires "public hearing" when "the station licensee" does not consent to the proposed change. Section 303 (f) also deals only with "changes in the frequencies, authorized power, or . . . times of operation," not broadly with *modification* of station *license*, as does Section 312(b). Section 303(f) is not limited in terms to changes made *in the license* itself, while Section 312(b) is so limited in its terms.

modification and both to require hearing, unless the licensee affected consents to the change. This is true, notwithstanding Section 303 (f) in its principal grant of authority is, as is noted later, primarily a rule-making or "legislative" section, and the proviso is in one aspect a limitation upon the Commission's rule-making power.

But to regard Section 303 (f) as merely a duplicate or alternative provision to Section 312 (b), for protection of the licensee when his license is to be modified adversely, would make it practically superfluous. This would also ignore the primary clause and purpose of Section 303 (f), as well as the differences in express terms of the two sections.[13] The proviso is merely an incident or a limitation of the main provision, which is a grant of power to the Commission to "make such regulations *not inconsistent with law* as it may deem necessary *to prevent interference* between stations and to carry out the provisions of this Act." (Italics supplied) The principal concern of the section is interference, and the limitations of the proviso, including the requirement of hearing, relate to matters most likely to cause and most directly related to interference. In contrast with Sections 309 (a) and 312 (b), which are primarily one-party sections, Section 303 (f) deals with subject matter which necessarily involves at least two private parties in addition to the Commission, with the principal occasion for difference and dispute between or among them, namely, interference, and with the chief causes of this. The section is therefore basically a two-party or multiple-party section, not counting the Commission. This is true notwithstanding the primary clause is cast in terms of delegating rule-making power to the Commission concerning the subject matter. It is nevertheless multiple-party subject matter. The parties affected may be two or more existing stations, or they may be one or more such stations and an applicant or applicants for license. The section does not literally designate others than "the station licensee". But it necessarily contemplates, from the very nature of the subject matter, that others similarly situated will be similarly affected, and the only persons who may be so affected are other licensees and applicants.

In my judgment this fact is of paramount importance, for determining both what is meant by "changes in the frequencies, authorized power, . . . times of operation" and the nature and character of the hearing required, each a matter in fundamental dispute here. Conceding, as I think we may, that Sections 309 (a) and 312 (b) are primarily one-party sections, that is, they involve ordinarily one party in addition to the Commission itself, and the hearings they provide are chiefly, though not necessarily exclusively, for determining matters in the first instance between the Commission and an applicant in the one case and it and a licensee under prospect of having the terms of his license changed in the other, Section 303 (f) is from the outset no such one-sided matter. It is essentially one which from the start raises issues affecting not only the Commission, but also other persons who as among themselves are opposed in interest. The conflict is not, even in the initial stage, merely Commission-applicant, as in Section 309 (a), or Commission-licensee, as in Section 312 (b). It is Commission-licensee-applicant or Commission-licensee-licensee. It is three-way, and it may turn out to be adverse three ways.

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[13] See note 11 *supra*, and *circa* note 12 *supra*.

In my opinion this paramount fact makes the hearing provided by Section 303 (f) an essentially different kind of hearing or stage in hearing from those provided and required by Sections 309 (a) and 312 (b). In the first place, it differentiates that hearing from the one provided by Section 312 (b) and prevents it from becoming a mere duplicate or alternative of the latter. If their issues, purposes and application were identical, there would be no need for two such explicit, and to some extent inconsistent, provisions for hearing. The mere fact that the modifications which might be involved in the hearing under Section 312 (b) are broader and more inclusive than those specified in Section 303 (f) does not explain the duplicate provision, since the latter includes the most important respects in which modification might be required under Section 312 (b). But beyond this, the two sections have or are likely to have entirely different consequences. Many of the modifications which may be proposed under Section 312 (b) relate to matters affecting only the Commission and the particular licensee, in other words, do not affect other licensees or applicants. They involve such things as equipment, observance of regulations in broadcasting, etc., essentially Commission-licensee issues and only such. Hence, in these cases, there would be no need for giving notice and right to participate to other persons. Consequently provision for such notice and participation was not included and the Section provides these protections only for the person necessarily and ordinarily affected, the licensee faced with possible modification of the terms of his license. It does not exclude others, but it gives them no right to come in at this stage. The Commission may permit them to do so in its discretion. But it is not required to admit them until it becomes apparent their rights also may be affected.

It would be a very strange thing, however, for Congress to insist upon notice and hearing when the issues lie merely between the Commission and one party, whether applicant or licensee, and to ignore entirely or fail to make similar provision in the much more highly controversial three-party situation. It would be even more strange for it to guarantee these safeguards to one of the parties in the latter situation, as against both the Commission and the other party interested, but deny it to the latter or leave his right to be heard entirely within the Commission's unlimited discretion, especially when he is or may be the only one adversely affected. In my opinion Congress did neither. Framing Sections 309 (a) and 312 primarily for one-way conflicts, it left the more complex multiple-party situation to be dealt with by Section 303 (f). And in doing so, while it gave the Commission large discretion and rule-making power, it provided specifically for public hearing upon proposed changes relating to the most important causes of interference and of conflict and dispute between licensees or between them and applicants. This section therefore is distinguishable from Sections 309 (a) and 312 (b), in necessarily bringing together from the start the private parties with clashing interests, as well as the Commission with which each may be at odds, and in providing a hearing for disposition of these issues. Congress, in providing for this hearing, did not intend only one of the affected partes to have notice and be heard.[14]

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[14] This view derives some support also from the provisions of Section 409(a), note 11 *supra*, that "In all cases heard by an examiner, the Commission *shall* hear oral arguments on request *of either party*," explicitly recognizing the right of more than one person to be a party. (Italics supplied)

The section is not aptly drawn, particularly in the language which provides for the hearing. But only superficial reading would lead to the conclusion that only one of the interested parties is given right to a hearing. Literally read, the section merely requires a hearing if the changes specified are to be made "without the consent of the station licensee." There is no provision, as there is in Sections 309 (a) and 312 (a), (b), for notice or for any specified person to be heard. As has been said, it is only by implication from the condition of "the station licensee's" failure to consent to the proposed change that his protections in these respects can be found within the section's terms. So much, however, is necessary, unless the "public hearing" is to be one at which no one but the Commission would have the right to appear and participate.

What is more important, the section does not in terms identify the "station licensee" whose consent is required if hearing is dispensed with and who, by implication, is entitled to hearing if he does not consent. Presumably, though by inference, he is or may be the licensee in the terms of whose license some change is proposed. But the section does not say this explicitly. In this respect also it differs in terms from Section 312 (b). The latter relates expressly to modification of "station license," and prohibits making the order until "the holder of such outstanding license" is given notice and hearing. No such explicit terms appear in Section 303 (f). It nowhere mentions "station license" or "modification" of license. It does refer to "station licensee," but in no way, except by possible implication, does it identify him as the "holder of the outstanding license" which is to be "modified" in terms, or exclude the licensee whose operations may be more seriously affected, even destroyed, by favorable changes made in another operator's license. In short, section 303 (f) is drawn in different terms and, in my opinion, for different purposes, from Section 312 (a), (b). Literally the hearing provision relates to "changes in frequencies, authorized power, or . . . times of operation," not to "modification" of outstanding licenses. Literally also it requires the consent "of the station licensee," if the change is made without hearing, and hearing if such consent is not given. But it does not specify whether the licensee is one in the terms of whose license a change is to be made or one only affected by a change made in another's license or by granting a new application. This further narrows the crucial issue.

The Commission asserts the only person entitled to hearing under Section 303 (f) is the station licensee in whose license the change is made. Hence, in its view, KOA had no right under the section to be heard, since there was no change in its license and it continued free to operate on the same frequency, power and time after WHDH's application was granted as before. This view is presented with vigor and combatted with equal force. Much of the argument revolved pedantically about the difference between "in" and "of," that is, whether "change *in* frequency" means "change *of* frequency," as if the two forms might not mean the same thing and that as well what the one as what the other asserts. The controlling principles of construction are greater than prepositional hairsplittings.

The Commission's interpretation, though possible upon the language, would ignore the fundamental character of the subject matter and of the controversies as well as the conflict of interests; make the

section's provision for hearing one-sided; exclude one of the private parties interested and, in some instances, as in this case, the only one adversely affected; make the section a merely narrower duplicate of Section 312 (b), without taking account of their differences in terms, purposes and ordinarily applicable situations; and, finally, so construed, there would be serious question concerning the Section's validity. That construction would create the incongruous situation that an applicant for a license and a licensee facing literal "modification" would be entitled by the terms of the Act to hearing before adverse action, but a licensee equally or more seriously "affected" by the granting of another's application or changing another's license favorably would have no right to be heard except in the Commission's discretion. Logically this would be true, notwithstanding the interference thus created might blot out the "affected" station's operations. In this view a commercial station could wipe out a nonprofit one completely by licensed interference and, under the Commission's argument that financial injury is the only basis for appeal, the latter would have no right to be heard before either the Commission or the courts. If the injured station were also a commercial one and could show financial injury, it could appeal, but would have no right to be heard before the Commission. If it could not show financial injury, it would be in the same boat with the nonprofit station.

Such a construction would run contrary to the policy of every other provision for hearing in the Act. Not only in Section 303 (f) itself, but in Sections 309 (a) and 312 (a), (b), the statute dispenses with hearing when the action to be taken is *favorable* to the person, whether applicant or licensee, whose interests are directly and immediately involved. It is zealous to provide for hearing when the decision is or may be adverse to him. Yet, in this situation, KOA is the only station adversely affected. The action is favorable to WHDH. It was merely an applicant. KOA was an existing station. As between the two, if either was entitled to the greater protection, it would seem to be KOA. If the action taken or proposed had been adverse to WHDH, it had a statutory right to hearing, and in fact the Commission respected it. Yet when it reached the point of proposed decision in WHDH's favor and adverse to KOA, it denied that the latter had any right to hearing, whether statutory or constitutional. This perverts the hearing policy of the Act. That is to dispense with hearing when decision is favorable to the one affected, to require it when it is adverse. Section 303 (f) is no exception. It does not specify in terms who shall be heard or have notice. But it provides for public hearing when the "station licensee" does not consent to the proposed change in frequency, power or time. It does not say "the licensee whose license is modified in terms." Unquestionably it includes him. But he is amply protected by Section 312 (b). Whether he or the other station or stations affected will be injured depends, not on the mere fact his license is altered, but on *how* it is changed, whether favorably to him or to the others. The Commission's view posits the right to hearing, not upon the question who is hurt or likely to be hurt, as do the other sections, but upon whose letter of license is altered or likely to be changed. It ignores realities, effects and consequences in favor of the formal and literal nature of the change "The letter killeth; the spirit keepeth alive."

Section 303 (f) does not in terms exclude the station licensee who is injured by changes favorable to other licensees or applicants. Such licensees may be the only persons injured or adversely affected by the action. In such a case (and this is one), to posit hearing upon the want of consent of the licensee in whose favor the decision is made would be to deprive the only person injured or capable of being injured, and through him the public he serves, of the right to be heard. Such a view would pervert the section into an instrument for suppressing all protest by the only person hurt or likely to be hurt, except possibly as he might raise his voice on appeal, and then only, in the Commission's view, to be met with the answer that he has no right to be heard before it. It would suppress also representation of the public interest which it is the primary purpose of the statute to protect and secure.

In my judgment therefore Section 303 (f) cannot be given the narrow construction, merely duplicating the function and purpose of Section 312 (b), for which the Commission and WHDH contend. In addition to its obvious injustice, contradiction of the statute's general hearing policy, failure to take account of the differences of the two sections in language, subject matter and character of the controversies dealt with, the Commission's view refuses to recognize that the fact of interference rather than mere literal change in the terms of a license is what causes harm and chaos to stations affected, to the industry, and to the public. If accepted, it would also raise serious question concerning the section's validity, both for want of essential minima of procedural due process in some opportunity to be heard as of right and for want of essential fair play in favoring one interested party unduly as against another. Neither preservation of the public interest nor of the Commission's broad power and discretion to conduct its functions in disposing of the public's business requires acceptance of an interpretation so doubtful and unfair.

The foregoing views necessarily contemplate that the hearing provided by Section 303 (f), under the proviso, has in such an application as this "quasi-judicial" rather than merely "legislative" effect. That is true, in my opinion, notwithstanding the Section's principal grant of power is to make rules. In such an application as this, the making of rules relating to the defined changes necessarily affects existing rights by changing them, and that is as true as if the change were made by order rather than by rule. When such an effect is achieved, whether by the one form of action or the other, the ordinary distinction between "quasi-legislative" and "quasi-judicial" action gives way before the elementary requirement that rights be not destroyed or impaired without hearing. The proviso requires hearing whether the change is in form "legislative" or "judicial."

B. The Regulations and Their Application

It remains to consider whether the regulations, as they have been applied, have violated appellant's right to a hearing. The construction given above to Section 303 (f) does not mean that every licensee who may be in some way, however minutely or remotely, affected by the change or who may consider or surmise that he will be affected, is entitled to a hearing or that the hearing must be a full-panoplied

judicial proceeding. Further questions therefore are: (1) What interest or injury must an affected licensee have, and how must this be disclosed, in order for him to assert the right to hearing; (2) what is meant by hearing; (3) when does the right arise and when may it properly be asserted?

Interference may affect only a few stations or many. With frequencies crowded as they are, a change in the frequency, power or time of one station may affect dozens, possibly hundreds of others, some seriously, some only slightly. Expedition of the Commission's functions requires that hearings not become radio conventions or interminable trials like some receivership proceedings. There must therefore be some limit to the number of persons entitled to participate as parties and to the extent to which those so entitled may take part.

Apart from applicants and licensees faced with modification or revocation of license, the statute makes no express provision for determining who may be necessary parties, whether by right of intervention or as persons entitled to notice and party status from the inception of the hearing. With the two stated exceptions, the Commission has treated the matter as one of intervention under rules prescribing the basis upon which "affected" stations and others may come in. Under its former regulation, Rule 105.19, Rules and Regulations (1935), disclosure of "a substantial interest in the subject matter" was sufficient. This proved unsatisfactory[15] and has been revised to add the requirement that the petition also show "the facts on which the petitioner bases his claim that his intervention will be in the public interest." Rules and Regulations (1939), Section 1.102.

The two regulations are alike in excluding persons who cannot show substantial interest. There would seem to be no valid objection to this. Participation as parties of persons only insubstantially or remotely interested or affected is not necessary for protection of either private right or public interest. Exclusion of such persons from participation as of right is necessary for efficient conduct of the Commission's functions and to keep the hearings within manageable bounds.

Affirmatively, however, the two rules operate differently. The practical effect of the old one (Rule 105.19) was that affected licensees became parties upon disclosing in the petition "substantial interest in the subject matter." Upon this showing, intervention became a matter of right. So effective, the rule may be taken as having complied with the implicit requirements of Section 303 (f). *Red River Broadcasting Co.* v. *F. C. C.*, 69 App. D. C. 1, 98 F. (2d) 262 (1938). Persons substantially affected by action proposed under that section had the right to come in. That it was exercised nominally as a process of intervention, by filing a petition showing the nature of their interest, rather than by receiving notice and being regarded as parties from the outset, was no more than a reasonable concession to the Commission's difficulty of ascertaining in advance who might be sufficiently interested and of confining the hearing within reasonable bounds. *Red River Broadcasting Co.* v. *F. C. C.*, *supra*.

[15] See MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, PART 3, FEDERAL COMMUNICATIONS COMMISSION (1940) 16 ff., GELLHORN, ADMINISTRATIVE LAW—CASES AND COMMENTS (1940) 511.

The new rule (Section 1.102), however, excludes persons substantially interested, including existing licensees "affected," unless the petition states facts to show their "intervention will be in the public interest." The intended purpose was to cut down the number participating under the old rule.[16] The language of the new requirement is ambiguous. If by it were meant that the intervenor must show that the public interest is tied up substantially with his private one, so that in the hearing he would be champion for both, perhaps the analogy to the conditions necessary for appeal, as stated in the *Sanders* case, would sustain the further limitation.

The rule, however, has not been so applied. The Commission has not interpreted it as calling merely for a statement of specific facts to show that the public interest is involved in the petitioner's operations, will be affected substantially and adversely by the change proposed, and consequently that the petitioner's participation will be in championship of both its own and the public interest. Rather, as counsel have stated the matter in the brief, the decisions denying appellant's right to intervene were "not based on appellant's lack of interest. The Commission held that whether or not appellant had a sufficient interest, it should not be permitted to intervene because it failed to show *how its participation in the hearing* would be *of any assistance in the determination of the issues involved.*" Referring to the practice under the former rule (Rule 105.19), it is also said that procedure "was abolished because it made impossible an efficient administration of the Act." And again, "It thus became apparent that interest alone was an insufficient test for intervention... Virtually every application involves many persons who claim to be interested... Most such applications are for facilities in a community which already has one or more stations which may be fearful of the petition . . . or are for facilities which cause electrical interference to existing stations. In many situations both factors combine to increase the number of potentially interested persons... In practically every instance the persons who claim interest in the proceedings are existing licensees whose private interests are promoted by protracted proceedings which delay as long as possible the establishment of competing facilities. In view of these facts there is no wonder that the old intervention rule did not conduce 'to the proper dispatch of business and to the ends of justice.'"

So applied, the rule comes down at best to one of efficiency, without controlling regard to interest, public or private, or how far it may be affected; at worst to one of mere convenience to the Commission in performing its functions. That this is the meaning and effect of the rule, as it has been applied, appears not only from the argument and the briefs, but also from the Commission's key decision in support of this policy, *In re Application of Hazelwood, Inc.* (Docket 5698), from the undue reliance placed in argument upon the breadth of the Commission's discretion and rule-making power, and from the action taken in this case.

A rule which posits the basic right of hearing exclusively upon mere convenience to the Commission or whether the petitioner's participation "will be of assistance to it in determining the issues,"

[16] *Ibid.*

leaving this to be determined solely in its discretion, is not reasonable. It is a denial of any right to hearing. That it may be inconvenient or time-consuming for such a body to hear persons substantially interested and affected, or that, in the Commission's exclusive discretion, they may not be able to aid it, furnishes no basis for refusal to hear their side of the case, whether on the facts or the law. Efficiency is not to be bought at such a price to essential fairness. *Cf.* Brandeis, J., dissenting in *Myers v. United States*, 272 U. S. 52, 240 (1926). If therefore the rule has been applied to appellant in this manner and with this effect, it has cause for complaint. Whether it has been so applied and with such consequence is the remaining question.

Upon that, the facts are important, as are also the questions whether appellant disclosed its own and the public interest and the affectation of both sufficiently. Involved also is the question of what kind of hearing appellant was entitled to have.

In my opinion there was no improper denial of hearing prior to the denial of the second petition for intervention filed December 16, 1940, when the Commission gave notice to KOA and others of its *proposed* findings and conclusions favorable to granting WHDH's application. Until then it was wholly possible the application, filed under Section 309 (a), would be denied. Until that time the proceeding was, as has been pointed out, essentially a one-way matter, involving questions primarily and initially between the applicant and the Commission. It had been unable to decide from the application in favor of the applicant. Accordingly, as the section required, it put the matter down for hearing and notified WHDH. It also gave notice to others who might be affected, including KOA, though the section did not in terms require this. Appellant then petitioned for intervention and the petition was denied, as were a petition to review this action and a motion by appellant to dismiss the application on the ground it did not conform to the rules. In none of this was there abuse of the Commission's powers or discretion or violation of appellant's statutory or constitutional rights. In this initial stage the burden was upon the applicant to convince the Commission *prima facie* that granting its application would be in the public interest. The very fact the matter was set for hearing was a tentative indication the decision would be adverse to the applicant.[17] WHDH had therefore the laboring oar. Unless and until it convinced the Commission there was apparently valid ground, at least a *prima facie* case, for granting the application, no harm was done or could be done to other stations. Hence, until it appeared from this initial stage of the total administrative process that some harm to KOA and others similarly situated possibly or probably would result, there was no essential reason either in due process or in the provisions of Sections 309 (a) and 303 (f) for bringing them in. Until then the Commission was entitled in its discretion, as Section 309 (a) contemplated, to treat the matter as one exclusively between itself and the applicant. So much by way of concession, not only to the terms and the general scheme of the statute, but also to efficiency in performing the Commission's functions, is reasonable.

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[17] Monograph of the Attorney General's Committee on Administrative Procedure, Part 3, Federal Communications Commission (1940) 13.

Concomitant with this view of the statute, however, is the requirement that the conclusions of law and fact reached by the Commission in the initial stage, concerning issues which might affect other parties substantially, should be tentative, not final and conclusive, if they were favorable to the applicant. This, in fact, appears to have been observed, since the findings and conclusions were issued as "proposed," not as final and decisive, and notice concerning the proposed action was given to affected persons.

At this point, however, the clash between the interests of KOA and WHDH, and their respective public constituencies, became apparent, with the possibility of the latter's success. WHDH had succeeded in discharging its initial burden. The necessary effect of action in its favor would be to create electrical interference with KOA and also to require its reclassification under the Commission's rules. At this stage, then, the matter had become one no longer primarily between WHDH and the Commission, but one primarily between them, on the one hand, and KOA and other stations adversely affected, on the other. Though the process initiated under Section 309 (a) would not become final and complete until conclusive decision had been made, the provisions of Section 303 (f) then first came compellingly into play, overlapping the final phase of the proceedings under Section 309 (a), and required that persons substantially and adversely affected by the proposed decision be given opportunity to present their side of the case.

At this point appellant filed its second petition for intervention, which was denied January 7, 1941. However, the order permitted it to file a brief *amicus curiae*. It did so and participated in this character in the oral argument upon the question of adopting the proposed findings. On March 27, 1941, the proposed findings and conclusions were adopted by a vote of three to two, with two Commissioners not participating. The members voting in the negative filed a vigorous dissenting opinion. 8 F. C. C. Rep. —— (1941). The decision became effective by formal order April 7, 1941. Appellant's petition for rehearing was then denied and this appeal followed.

In the final and decisive stage of the Commission's action, therefore, appellant was excluded as a party, notwithstanding it was permitted to file a brief and appear in oral argument as *amicus curiae*. Unless these concessions gave it all to which it was entitled by way of hearing, the exclusion cannot stand as justified. This is because the basis on which it was made was not valid. It is not necessary to regard Section 1.102 as invalid, since it may be possible to apply it with valid effect. However, the manner in which it has been applied, generally and in this case is invalid, as being contrary both to Section 308 (f) of the Act and possibly also to elementary fair play required by due process.

Conceding appellant's interest, its substantial character, not denying its substantial relation to the public interest or that this as well as appellant's private interest might be adversely affected by the order, the Commission refused to recognize appellant as a party on the ground its petition did not disclose facts to show how its participation in the proceedings would be helpful to or would assist the Commission in deciding the issues. It then belied this action by announcing in the order of denial that appellant might file a brief as *amicus curiae*.

In view of the basis for the Commission's action, it is perhaps not necessary to inquire whether the petition, under some other rule or some other interpretation of the present one, would be sufficient. It was denied for an invalid reason, and that in itself is error sufficient to require reversal, unless its effects were cured by allowing appellant to appear as *amicus curiae*.

The petition, however, more than complied with the rule, apart from the invalid interpretation. It set forth petitioner's interest as a dominant clear channel station on the frequency 830 kc, with freedom from interference at night; that granting WHDH's application would cause electrical interference; require change in classification of KOA's frequency under the Commission's rules; result in degradation of service on frequency 830 kc prejudicial to the priority rights of the United States under the North American Regional Broadcast Agreement; discriminate against service to rural listeners and in favor of urban ones already well served; and stated other reasons not necessary to repeat. This admittedly was sufficient to show the substantial character of petitioner's interest, and in addition its substantial relation to the public interest, including service to rural areas, possible discrimination against them in favor of urban regions, and possible injury to the nation's priority rights under the international treaty, together with possible or probable substantial injury both to appellant privately and to the public interest. So much appearing, the petition complied in every respect with Section 1.102, except the construction that "intervention will be of assistance to the Commission in its own judgment" or "will be convenient for the Commission." The petition therefore complied with the rule in all its valid aspects, and should have been granted.

The Commission argues, however, that appellant was accorded in substance its full right to hearing, notwithstanding it was excluded as a party, because, first, it was allowed to file a brief and to appear in oral argument as *amicus curiae;* and, second, under Rule 1.195 appellant had, but failed to exercise, the right to present such evidence as it might choose to submit. Rule 1.195 provides for maintaining in the office of the secretary a record of all communications received relating to the merits of any application, together with the names and addresses of the senders. When the date for hearing is set, the secretary is required to notify these persons that they will have opportunity to appear and give evidence. Under the rule they are not precluded "from giving any relevant and competent testimony" because they lack "a sufficient interest to justify . . . intervention as a party. . ." In view of these things the Commission says appellant had, but waived, full opportunity to present evidence, and had also full opportunity for argument, oral and written, upon the legal issues—thus, in effect, to appear upon both the facts and the law. It asserts therefore that appellant actually was deprived of no substantial right. This presents the final refinement of the issue.

Appellant claims too much. The petition, among other things, sought to "reopen the proceeding in order to afford petitioner an opportunity to introduce evidence, to cross-examine all witnesses, and otherwise participate fully in the proceedings; upon such record file proposed findings of fact and conclusions of law; have the right to file exceptions to any proposed Commission decision thereafter issued; request oral argument upon such proposed decisions and upon

its exceptions thereto; in all respects participate fully in the important issues involved in the application" of WHDH. In short, appellant sought not only to participate as a party in the final and crucial stage of the process under Section 303 (f), but also to reopen, repeat and participate in the initial stage under Section 309 (a) as fully as would a party in judicial proceedings in equity with the rights to present evidence, cross-examine witnesses, including all who had been heard previously, take exceptions, submit findings, take part in argument, etc. Such a view of the proceedings would convert them essentially into a judicial trial in the final stage for reexamination *de novo*, so far as appellant might demand, of issues and matters presented in the initial one. In my judgment no such extensive right of participation is contemplated by Section 303 (f) or any other section, or is required by due process, and to enforce it would pervert the statutory scheme, convert the requirement of fair administrative hearing into one for a judicial procedure, and bring about a clogging of the Commission's work and functions inconsistent with their nature, complexity and due performance.

Both the Commission and appellant therefore have gone too far in their positions. On the one hand, appellant's right to hearing is not conditioned absolutely in the Commission's discretion, as it would be if limited to participation in argument as *amicus curiae* and in presenting facts under the provisions of Rule 1.195, applicable to all members of the public. Its right to participate is to do so as a matter of right, not of grace, and as a party. That is true, notwithstanding the extent of participation allowed as a matter of grace or discretion may be substantially or nearly identical with what the party is entitled to have as a matter of right. On the other hand, appellant is not entitled to a full-dress judicial proceeding or to dictate the extent of its participation, without regard to reasonable limitations which may be imposed by the Commission to achieve orderly and not unduly extended hearings. Some middle ground therefore must mark out the boundary between appellant's right and the Commission's power.

It would be enough to dispose of the appeal that appellant was excluded from appearing as a matter of right and allowed limited participation as a matter of grace. But to do this, without more, would leave the further proceedings in doubt. Two problems must be distinguished, one the determination of appellant's right to participate, the other the extent of that right. The former is not a matter of discretion with the Commission. One in appellant's position must be heard upon issues such as this proceeding involved in the final stage, under Section 303 (f). But that right is not inconsistent with the Commission's requiring its existence to be shown by something more than mere general allegations that the holder is substantially interested, will be substantially affected, and that the public interest is involved and will be likewise affected. If this were all that could be required, practically everyone affected in any way, immediately or remotely, substantially or slightly, could come in at his option by alleging these generalities. On the other hand, it is not necessary to set forth the evidence which would be presented on the merits, nor would requiring this be reasonable. Between these two extremes a middle ground may be found to enable the Commission to determine that the interest and the injury, public and private, are substantial

and real rather than insubstantial or visionary, and are substantially related. Perhaps an analogy can be taken from judicial proceedings in which findings of fact are required, in the distinctions which involve evidentiary facts, basic facts and ultimate facts.[18] There could be no undue limitation of the right to appear in requiring existence of the ultimate facts on which it is posited to be shown by statement of such basic facts, so that the Commission might be guided by something more than the vacuistic formulae of "substantial interest," "adversely affected," etc. So much at least would seem to be properly conceded, not to the Commission's discretion, but to the necessity that it be enabled to distinguish with reasonable certainty between persons entitled to come in as of right and others not so entitled but claiming this status on grounds insufficient once the actual facts of their situation become apparent. If at times there may be difficulty, as there is in judicial proceedings, in determining what are basic as distinguished from merely evidentiary facts, reasonable latitude toward including some of the more important of the latter will resolve it. The error if any should be made upon the side of stating more rather than less than may be actually necessary.

The other problem, involving the extent of the right to participate, is properly within the Commission's discretion under its broad rule-making power, reasonably exercised, beyond a few essential minima required by elementary notions of fair play. Neither the statute nor the Fifth Amendment prescribes specifically what these minima are. Nor has it been made clear by judicial decision what constitutes a minimum compliance with due process in the way of administrative hearing. Presumably this will vary to a considerable extent with the nature of the substantive right, the character and complexity of the issues, the kinds of evidence and factual material,[19] the particular body or official, and the administrative functions involved in the hearing. In other words, essential fairness of hearing bears some relation to these factors, but beyond certain, though very few, basic requirements which may be common to all fair hearings, the extent of participation by parties and others is a matter for regulation by statute or properly conferred rule-making authority.

The Communications Commission deals with highly technical and complex engineering and economic functions and relations, a highly organized and crowded industry serving primarily a public interest, but strongly affected with private incentive. Its functions are both regulatory and quasi-judicial. Its action in a single case often affects many persons, station licensees and others. Its hearings therefore tend to be many-party ones, in which each one appearing seeks as large a participation as possible. Often certain issues affect some, but not other parties. Yet once a party has come in, his tendency is to have a hand in all that goes on. Cross-examination especially lends itself to abuse in such a situation.[20] So does the opportunity to present expert testimony.[21] Consequently, in contrast with the fun-

[18] Saginaw Broadcasting Co. v. F. C. C., 68 App. D. C. 282, 96 F. (2d) 554 (1938).

[19] See Davis, *The Requirement of Opportunity to be Heard in the Administrative Process* (1942) 51 YALE L. J. 1093, 1106, 1117.

[20] *Id.* at 1103. MONOGRAPH, *op. cit. supra* note 17, at 16, 17.

[21] Particularly when the agency has a body of technical experts, such as the Commission's engineering staff, competent to give disinterested expert opinion upon the technical issues or questions. See MONOGRAPH, *op. cit. supra* note 17, at 19.

damental right to come in, to be present as a party and be heard, much in the way of discretion must be conceded to the Commission in controlling the extent to which parties may be allowed to participate. The Commission's objective of keeping the hearings within manageable bounds is to be achieved, therefore, not as has been attempted by excluding persons who rightfully should come in, but by controlling through reasonable regulation the extent to which they may take part. As to this the Commission has and rightfully may exercise much authority in various specific ways.

The essential minima for fair hearing would seem to include a reasonable opportunity to present evidence concerning disputed issues of fact and argument upon issues of law affecting the party tendering them, and to do both as a party to the proceeding, not merely in the character of one present on sufferance or favor. In neither respect however does this mean, as appellant seems to think, that a party may require retracing all steps taken before the stage at which his right to come in arises or that he may wander throughout the record upon issues affecting other parties, but not himself substantially.[22] In this case, therefore, it does not mean, as appellant assumed, that it could require the entire proceedings prior to the time of its proper intervention to be reopened with right on its part to cross-examine all witnesses heard in the preliminary stage under Section 309 (a) and, apparently, in its discretion to compel reproduction of all testimony then produced. Such a view would force the Commission to incur the waste of holding the preliminary hearing upon the application under Section 309 (a) and then repeating all that had been done in it when it becomes apparent, from the proposed determination favorable to the applicant, that the final stage of hearing under Section 303 (f) must be gone through with in order to afford one in appellant's position his opportunity to be heard.

The statute contemplates no such wasteful process, and in my opinion due process does not require it. Adequate protection for appellant's rights can be secured without this, and in full consonance with the statutory scheme. It contemplates, as has been said, a preliminary hearing in which only the applicant is required to be present as a private party. It may become final, if the decision is adverse to him. If so, others affected will not be harmed, and their presence in this stage would only clutter the proceedings and the record. If not, then appellant's right to hearing arises under Section 303 (f). But nothing in the act or in the Constitution requires this to be entirely *de novo*. It is enough that it be adequate.[23] At the proper stage of intervention, the record in the preliminary hearing has been made. It may be made available to the intervenor. From the multiplicity of evidence and of issues it is not unfair to require him to specify, at least in a general way, the issues he proposes to meet, the evidence he wishes to contradict, and other matters concerning which

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22 This seems implicit in the well-recognized rule that due process requirements are satisfied if at any time before governmental action becomes final, hearings are allowed either by administrative or judicial action, and therefore persons not directly or immediately affected in the initial stages of a hearing which involve primarily the interests of others may be excluded until a later phase when their interests become directly and immediately involved. See Davis, *op. cit. supra* note 19, at 1104, 1136-40, and authorities cited; MONOGRAPH, *op. cit, supra* note 17, at 20.

23 *Ibid.*

he wishes to raise objection. This should be done with particularity, not merely by broadside charge against the entire previous proceedings. With the issues so self-limited, it will then be for the Commission to determine whether, in the exercise of its quasi-judicial discretion, the intervenor's participation should be further limited, in relation to the production of evidence, cross-examination, argument or other normal incidents of hearing. In this manner each party may be restricted fairly to the issues and participation pertinent to his case, rather than allowed to roam through the entire proceedings upon matters relevant to others, but not to himself or matters concerning which he has no objection. Perhaps a considerable part of such confinement may be accomplished by the issuance of appropriate general regulations. But whether by that method or by action in the particular case, the result may be achieved of affording the intervenor fair and adequate hearing, without at the same time permitting him to run away with the hearing, nullify all that has gone before the intervention, or unduly extend the hearing beyond what fair protection of his rights and the public interest may require.

It is not necessary to extend the discussion further. Appellant has shown sufficiently its right to come in. It should have been allowed to do so, as a party to the proceeding, not merely as a friend of the Commission or a member of the public. That is true, notwithstanding the extent of participation actually allowed may have been substantially all that a party was entitled to have, though by this statement it is not intimated that this was true. That question need not be determined. It is one thing to be present as a party, and as a matter of right. It is another to appear upon favor or by sufferance. It is still another to be heard in a particular fashion or at a particular time or stage.

Appellant's right arose, not when the preliminary proceeding upon the application were begun nor when the matter was set for hearing, nor thereafter prior to issuance of the "Proposed Findings of Fact and Conclusions"; but when these were issued. At that time, upon the showing made in appellant's petition, it should have been recognized as a party and allowed to participate thereafter on that basis."

The extent of its right to participate, however, was largely within the discretion of the Commission, having due regard to the principles above stated. Appellant was not entitled as a matter of right to all of the relief demanded in its second petition to intervene or in the petition for rehearing, and upon another hearing may be required, in the Commission's reasonably exercised discretion, to confine itself as has been indicated, and to point out with reasonable particularity the portions and features of the previous proceedings it wishes to challenge.

This does not amount, in substance or effect, to acceptance of the Commission's view that appellant can be excluded for failure to set forth facts to show that its intervention will be of assistance to the Commisison in deciding the issues. That factor is pertinent to the question how far appellant may participate, though perhaps not con-

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" This statement is not intended as meaning that adequate hearing might not have been afforded at a later stage, by appropriate regulation, as upon petition for rehearing. *Cf.* United States v. Illinois Central Ry., 291 U. S. 457 (1934); Comment, *Necessity for Hearing Before Enforcing Order of Interstate Commerce Commission* (1934) 43 YALE L. J. 1300; Davis, *op. cit. supra* note 19, at 1136–40.

clusive of it. It is not the criterion of the right to be heard. It may, in fact, have exactly the opposite effect, that is, the intervention may present facts or legal argument, contrary to those tentatively accepted by the Commission, which will make its decision more difficult. That is one purpose of hearing. Nor does this view posit the right to be present and to take part upon an exercise of the Commission's discretion or favor. With that right established, every other has protection, and if there is violation by some attempted exercise of discretion in any other respect it may be corrected, first by argument before the Commission itself, or if it is not corrected there, then by appeal.

Without attempting therefore to blueprint the procedure to be followed with respect to the extent of appellant's participation in another hearing, we may leave such matters to the Commission's judgment, where they properly belong, subject only to compliance with the basic requirements of fair play and adequate opportunity to be heard.

For the error in excluding appellant from participation as a party in the final and controversial stage of the proceeding, contrary to the requirement of Section 303 (f) of the Act, the order must be reversed with directions to afford appellant opportunity for hearing in accordance with the provisions of that section.

Reversed and remanded.

Opinion

GRONER, C. J., and VINSON, J.: Judges Groner and Vinson concur in the conclusion of Judge Rutledge that appellant has not only a right to appeal to this court under Section 402 (b) (2) of the Act, but also the right to intervene in the proceeding before the Commission. We are, therefore, in agreement with Judge Rutledge that the case should be reversed and remanded for further hearing.

In view of the importance of the principles involved, we consider it desirable, however, to set out in a word our separate views as to the meaning and effect of those Sections of the Act upon which we all agree the decision must turn.

We are in agreement with Judge Rutledge that under Section 303 (f) the Commission should have accorded appellant the right to participate in the hearing as a party. But we are also of opinion that, since in the facts of this case it is apparent that the granting of the application of the Matheson Radio Company, Inc., operators of Station WHDH at Boston, would result in what amounts, if substance be regarded rather than form, to a modification of appellant's license, Section 312 (b) of the Act also provides a right of participation by appellant in the proceedings under that application. While the question is no longer material here—since we assume that, in the present state of the record, the Commission will re-open the proceedings and permit the intervention of appellant as a party—we express our disagreement with the view of Judge Rutledge that the Commission, in its discretion, may exclude appellant from participation until

the proposed findings of fact have been made. It is our view that participation in the hearing, under either Section 303 (f) or Section 312 (b), should have been accorded both to appellant and to Matheson Company from the outset. It is true that Section 309 (a) appears to contemplate that if upon examination of an application for a station license, or the renewal or modification thereof, the Commission shall make a determination in favor of the application, it need not accord a hearing to the applicant. But we think, whatever the effect otherwise of this section may be, it is inapplicable in the facts of this case. Here the application of Matheson Company for an extension of its facilities is in effect an application, as we have said, the granting of which will, if substance be regarded, modify the license of appellant. In the circumstances, we think Section 312 (b) is applicable and that both appellant and the Matheson Company were entitled to participate in the proceedings as parties and with the rights of parties. We think the statute contemplates that a licensee's right, although limited and defeasible, shall not be modified or destroyed without a hearing. To allow a hearing only after proposed findings of fact have been made is to deprive appellant of participation during the crucial period of the proceeding—that is, when the evidence is being taken and the record being made up. Appellant's interest existed from the beginning, and it is not enough that that interest was considered by the Commission. It is axiomatic that one whose rights will be affected, not only may himself engage in their protection, but must do so affirmatively and at every step in the proceedings—or take the consequences of his default. *Red River Broadcasting Co.* v. *Federal Communications Commission*, 69 App. D. C. 1, 98 F. 2d 282. There was no default in this case.

Opinion

STEPHENS, *Associate Justice:* I concur in the conclusion of Judge Rutledge that the appellant has not only the right to appeal to this court under § 402 (b) (2) of the Communications Act but that it had also the right to intervene in the proceeding before the Commission, and I am therefore in agreement with Judge Rutledge that the order should be reversed and the case remanded for further hearing. I am also in agreement with the views and conclusions expressed by Judges Groner and Vinson in their separate opinion. I desire to add the following:

I am aware that the provisions in the Communications Act for hearings speak *in terms* of licenses and rights which are undergoing alteration, suspension or revocation through direct action of the Commission thereon, and not *in terms* of the rights of existing licensees—such as those of the appellant—which will be impaired by the direct action of the Commission in extending the facilities of another licensee. But I think that by clear implication the safeguards of the Act operate for the benefit of such a licensee as the appellant. For it cannot be doubted that the modification—in the instant case the extension of facilities—of one license right may have the consequence of impairing, or even of destroying, the business of another licensee; this in practical effect is a modification or revocation of his

license. A contrary view would regard form rather than substance. That the granting of new or additional station rights may have the consequence of impairing or destroying the busines of an existing licensee is recognized in *Commission* v. *Sanders Radio Station*, 309 U. S. 470 (1940), where the Supreme Court, after stating that it is not the purpose of the Act to protect a licensee against competition but to protect the public, that Congress intended to leave competition in the business of broadcasting, stated also:

> This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. . . . [309 U. S. 475–6]

It is true that in the *Sanders* case the statement is made that the policy of the Act is that no person is to have "anything in the nature of a property right as a result of the granting of a license." But the opinion in that case also recognizes that station licensees may be financially injured by the issue of a license to a competing station. The language first quoted must be read in connection with the opinion as a whole and in connection with the utterances of the Supreme Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940), and *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266 (1933). In the *Pottsville* case the Court said: "To be sure, the laws under which these [administrative] agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing." In the *Nelson Bros.* case the Court said: "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision." In view of the *Pottsville* and *Nelson Bros.* cases, and in view of the provisions of the Communications Act which recognize rights, limited in time and quality by the terms of the licenses issued, in station licenses (see especially §§ 301, 309 (b) (1), (2), 319 (b)), I think it clear that a station license issued under the Communications Act for a definite term for the conduct of a broadcasting business requiring substantial investment is more than a mere privilege or gratuity. Whether or not it may be technically called a property right, it is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury. I think the Supreme Court in the *Sanders* case in its reference to the absence of "anything in the nature of a property right as a result of the granting of a license" was using the term property right in the sense of a right absolute or indefeasible. It is clear of course that under the Communications Act a station licensee's rights are subject to modification, or even to revocation, in the public interest. But I do not think the *Sanders* decision was intended to be taken

as meaning that no right even of a limited and defeasible nature exists in a licensee. Nor do I think that the decision was intended to mean that an existing broadcasting station and the investment therein may be injured or destroyed by the introduction of competition or through the extension or modification of the facilities of other licensees *without a hearing before the Commission on the question whether the public interest, convenience and necessity will be served by such injury or destruction.*

Even if the Communications Act were doubtful in its recognition of the existence of rights in licensees and in its provision for hearings upon the question whether the public interest requires the reduction or destruction of such rights, I think it would be the duty of the courts to construe the Act as recognizing such rights and providing for such hearings—and this for two reasons. First, in the absence of indubitably clear language requiring such a conclusion, it would be unthinkable to conclude that the Congress would provide for the granting of station licenses for radio broadcasting contemplating, in connection with operating a station, investment in building space and equipment, the hiring of talent, the contracting for advertising, and the employment of labor, but at the same time fail to recognize that by whatever technical name they might be called, whether property rights or license rights, interests would arise, in the persons to whom licenses were granted, which should as a matter of fair play not be impaired or destroyed by the Communications Commission without a hearing upon the question whether the public interest would be served by their impairment or destruction. Right to a hearing before injury by the government in the public interest is one of the fundamental decencies guaranteed by democratic institutions. It is the safeguard of the Anglo-American legal system against arbitrary or capricious action by public authorities. No purpose should be attributed to Congress to deny such a right. Second, to construe doubtful language of Congress as permitting the impairment or destruction of a licensee's interests without a hearing would be to invalidate, under the due process clause of the Fifth Amendment, the action of Congress. That that clause protects against the arbitrary impairment or destruction of substantial rights even though they are limited by the public interest, is not open to doubt. *Cf. Northern Cedar Co. v. French*, 131 Wash. 394, 230 Pac. 837 (1924).

Dissenting opinion

Mr. JUSTICE MILLER dissenting: I find no substantial allegation of injury in any of appellant's reasons for appeal. Surely it is not enough, to secure standing to appeal on the basis of affectation of interest or aggrievement, that electrical interference will occur beyond that previously occurring. Surely some injury, actual or anticipated, should be the minimum requirement. And if injury has occurred or is threatened, what other test or measure of its substantiality could there be than that it is financial?

In the *Sanders* case the Supreme Court said: "Congress had some purpose in enacting § 402(b)(2). It may have been of opinion that one likely to be *financially* injured by the issue of a license would be the *only person having a sufficient interest* to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license."[1] [Italics supplied.] Of course, stated as it is in speculative form concerning legislative purpose, it is possible to argue that this language was not intended to say that *only* a person likely to be *financially* injured has a sufficient interest, within the meaning of Section 402(b)(2). But I think that is exactly what the Supreme Court intended to say. As the Commission in its brief points out, the word financially, which I have italicized, was added after the opinion was first released.[2]

While intangibles such as prestige, or position, in the broadcasting world may seem valuable to a licensee, still they are unimportant—in view of that free competition which Congress intended should exist in the field of broadcasting—unless injury to them would result in financial injury. If, for example, loss of prestige should result in loss of advertising then, perhaps, a tangible injured interest would appear which would give standing to appeal. But if there is no interest, of such character, that it will reveal itself in terms of financial injury, then there is no sufficient interest to give standing to appeal.

This is true even of a licensee which is operating on a nonprofit basis, a college, a church, or a benevolent institution. Financial backing is required to maintain such a licensee. If the injury threatened endangers that financial backing then the licensee may have standing to appeal; otherwise not. Where else could the line be drawn? Would it be sufficient that a Methodist organization was aggrieved by hearing Baptist doctrine preached in the same listening area; or that one college should be disturbed by the songs and cheers of a rival institution of learning?

It is apparent in the present case, therefore, that unless electrical interference was likely to result in financial injury appellant was not an aggrieved or affected person within the meaning of the statute. And if financial injury was likely to result, the licensee could have spelled out that fact in his reasons for appeal. It imposes no undue burden upon one who seeks judicial review of the Commission's decision, to require that he specify clearly, unequivocally, precisely, the nature of his alleged injury. This, appellant has failed to do.[3] Consequently, I would dismiss the appeal.

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[1] Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 470, 477.

[2] See Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 642.

[3] Stuart v. Federal Communications Commission, 70 App. D. C. 265, 267, 105 F. (2d) 788, 790; Perkins v. Lukens Steel Co., 310 U. S. 113, 125: "Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."

Dissenting opinion

EDGERTON, J., dissenting: I think that "person aggrieved or whose interests are adversely affected" contemplates a substantial injury as distinguished from a trifling or negligible one. I should suppose that interference *might* affect reception of KOA's signal so adversely, and over so large and important an area, as to cause substantial injury and give appellant standing to appeal, whether or not it caused financial loss. But interference is an elastic term; it may be of any degree. Some interference is minimal and practically harmless. Appellant's notice of appeal, though it alleges "substantial modification" of its license, alleges neither substantial injury nor any facts which constitute substantial injury. It alleges nothing more injurious that "interference to KOA in areas where KOA's signal is now interference free." This allegation would be supported if it were shown that in some small area, thousands of miles from Denver, and of no actual or potential importance to appellant, a few listeners could and did at rare intervals get, without interference, a feeble signal from KOA, and that their reception of that signal would be made a little worse by WHDH's modification. I think such an allegation would not show standing to appeal. Since appellant's actual allegation may mean no more, we can accept it as showing standing to appeal only if we waive the rule that pleadings are to be construed against the pleader.

If we take that step, I think we should affirm. I find nothing in the Communications Act which required the Commission to give appellant a hearing; quite the contrary. Yet the Commission gave appellant a hearing. It violated neither the Act nor due process.

The Commission was asked to and did modify the license of WHDH. Sec. 309 (a) of the Communications Act provides in effect that the Commission may grant, though it may not deny, an application for modification without a hearing. Most modifications of licenses affect other licensees, and Congress might easily have required that other licensees who stand to lose be given a hearing. It did not. So far as the Act is concerned, therefore, no hearing was necessary. True, Sec. 303 (f) requires that the licensee of a station be given a hearing if the Commission is to change that station's "frequencies, authorized power, or . . . times of operation." But that section is not applicable here, since neither the frequency, the power, nor the time of KOA, appellant's station, is being changed. Similarly, Sec. 312 (b) forbids "modification" of a license without opportunity to the licensee to show cause why the license should not be modified; but that section is not applicable, since appellant's license is not being modified in any particular.[1] Its license merely authorized it to operate with specified equipment, frequency, power, and time, and still authorizes it to operate with the same equipment, frequency, power, and time. To say that appellant's frequency or its license is being "changed" or "modified" seems to me an inapposite figure of speech. It is true that the Commission's rules, until they were changed in the course of these proceedings, stated that only one Class I station "will be assigned" to the frequency of 850 kilocycles. But that statement of the Commission's purpose or policy was not incorporated, or referred to, in appellant's license. Therefore the license cannot, un-

[1] Sec. 303, including (f) deals in a summary way with the "powers and duties of Commission." Sec. 312, including (b), deals in a detailed way with "revocation and modification" of licenses and with "notice and hearing."

less by a most liberal construction, be regarded as intended to make any exclusive grant to appellant, whether of equipment, frequency, power, or time. Appellant's license is no more exclusive in respect to frequency, power, and time than in respect to equipment. And the settled rule requires not a liberal but a strict construction of franchises and licenses.[3] Moreover, Section 301 of the Act provides that "no . . . license shall be construed to create any right, beyond the terms, conditions, and periods of the license," and the Supreme Court has said: "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public."[4]

The Constitution does not, in my opinion, give appellant a right to a full hearing, of the trial type, in the proceedings before the Commission. In the absence of statute, licensing authorities are usually under no duty to give any sort of hearing to license holders before changing rules which affect the value of licenses.[5] Appellant's case is somewhat similar to that of a licensed automobile operator who should demand that he be given a hearing before the speed limits are reduced. It is stronger in one respect; for appellant is, and the particular automobile operator is not more likely than anyone else to be affected by the change proposed. But it is weaker in another respect; for appellant is not, and the automobile operator is, forbidden to do after the change what he was free to do before the change. Only the consequences of appellant's activities, and not the activities themselves, are affected by the change which the Commission has made in the license of WHDH. Appellant is in substantially the same position as the owner of a licensed garage or liquor store who is subjected to new competition by the licensing of a similar business nearer his own than would have been possible under the regulations which were in force when his own license was issued.

It may be that appellant was, as a matter of due process, entitled to some sort of hearing. The Commission's proceedings had a fact-finding aspect, and were more likely to affect appellant's interests than those of any other person. But appellant was not entitled to a hearing which should include "the incidents of a trial in court."[6] Persons may be "heard" without being "permitted to intervene, and thus become parties."[6] Appellant was entitled to no more than a hearing reasonably adequate to protect its interests and reasonably practicable for the Commission and the public; in other words, to a fair opportunity to bring its facts and arguments to the Commis-

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[3] *Detroit United Railway* v. *City of Detroit*, 229 U. S. 39; *Piedmont Power & Light Co.* v. *Town of Graham*, 253 U. S. 193.

[4] *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475.

[5] *Cf. Lacquer & Chemical Corp.* v. *Mills*, 22 F. 2d 697 (D. C. E. D. N. Y.), *affirmed*, 22 F. 2d 700 (C. C. A. 2); *certiorari denied*, 276 U. S. 617.

[6] *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 316, 317.

[6] *The Chicago Junction Case*, 264 U. S. 258, 268. "The 'hearing' is the hearing of evidence and argument." *Morgan* v. *United States*, 298 U. S. 468, 480.

sion's attention.[7] It had such a hearing—whether of right or of grace we need not inquire. Pursuant to the Commission's Rule 1.195, it was given an opportunity to appear and present evidence. It chose not to do so. It was permitted to, and did, file a brief and make oral argument. Nothing more was required. It was not formally a party, and some aspects of a trial at law, including opportunity for cross-examination, may have been absent. To rule, as the majority of the court in effect do, that the Commission's action was therefore erroneous, is to cramp the administrative process by forcing it into the very mold which it is designed to avoid.[8] Since the Commission had to decide primarily a question of policy and only incidentally a question of fact, the technique of a trial would have been clumsy and wasteful.[9]

[7] When an importer has contested the valuation of his goods by the customs service, and exercises his right to have them valued by appraisers, the question "is not to be tried before the appraisers as if it were an issue in a suit in a judicial tribunal." *Auffmordt* v. *Hedden*, 137 U. S. 310, 323. "If he "is afforded such notice and hearing as enables him to give his views and make his contention in respect of the value of his goods, he cannot complain." *Origet* v. *Hedden*, 155 U. S. 228, 238.

[8] *Cf. Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

[9] *Cf. Davis, The Requirement of Opportunity to be Heard in the Administrative Process*, 51 Yale L. J. 1093, 1098.

Appellant could have had a hearing of the trial type if it had chosen to comply with the Commission's rule regarding petitions to intervene.

214 In United States Court of Appeals for the District of Columbia

Before Honorable D. Lawrence Groner, Chief Justice, and Honorable Harold M. Stephens, Justin Miller, Fred M. Vinson, Henry W. Edgerton, and Wiley Rutledge, Associate Justices:

NATIONAL BROADCASTING COMPANY, INC., APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

and

MATHESON RADIO COMPANY, INC., BERKS BROADCASTING CO., INTERVENORS

Appeal from the Federal Communications Commission

Judgment

Sept. 12, 1942

This cause came on to be heard on the transcript of the record from the Federal Communications Commission and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said Federal Communications Commission in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded for further proceedings in conformity with the opinion of this Court.

Per Mr. JUSTICE RUTLEDGE.

Separate concurring opinion by Mr. Chief Justice Groner and Mr. Justice Vinson.

Separate concurring opinion by Mr. Justice Stephens.

Dissenting opinion by Mr. Justice Miller.

Dissenting opinion by Mr. Justice Edgerton.

Dated September 12, 1942.

[Title omitted.]

[File endorsement omitted.]

215 In United States Court of Appeals for the District of Columbia

Designation of record

Filed Dec. 5, 1942

The Clerk will please prepare and certify a transcript of record on petition for certiorari to the Supreme Court of the United States in the above entitled case, including therein the following:

1. The appendix to the brief of the intervenor, Matheson Radio Company, Inc., in the United States Court of Appeals for the District of Columbia.
2. The appendix to the brief of the National Broadcasting Company, Inc., in the United States Court of Appeals for the District of Columbia.
3. Minute entry of argument.
4. Opinion.
5. Judgment.
6. This designation.
7. Clerk's certificate.

216 CHARLES FAHY,
Charles Fahy,
Solicitor General.

Service of copy of the above designation of record in the above entitled cause is hereby acknowledged this 4th day of December 1942.

GEORGE B. PORTER,
GEO. O. SUTTON,
H. R. S.
PHILIP J. HENNESSY, JR.

217 [Clerk's certificate to foregoing transcript omitted in printing.]

October Term, 1942

Stipulation as to record on petition for writ of certiorari

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that, for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. The appendix to the brief of the intervenor, Matheson Radio Company, Inc., in the United States Court of Appeals for the District of Columbia, No. 7933.

2. The appendix to the brief of the National Broadcasting Company, Inc., in the United States Court of Appeals for the District of Columbia, No. 7933.

3. The proceedings in the United States Court of Appeals for the District of Columbia, No. 7933.

It is further stipulated and agreed that the petitioner will cause the clerk of the United States Court of Appeals for the District of Columbia to certify and file the entire transcript of the record now on file in his office with the clerk of this Court, and that in the event the petition for a writ of certiorari is granted, the
219 printed record shall consist of the proceedings in the United States Court of Appeals for the District of Columbia and such portions of the entire transcript of the record certified by the clerk of that court as the respective parties may designate.

It is further stipulated and agreed that either party may refer in the petition and briefs to any portions of the certified transcript of record which are not included in the printed record to be filed in accordance with this stipulation.

CHARLES FAHY,
Charles Fahy,
Solicitor General,
Counsel for Petitioner,
Federal Communications Commission.
PHILIP J. HENNESSEY, Jr.,
Counsel for Respondent,
National Broadcasting Company, Inc.
GEORGE B. PORTER,
Counsel for Intervenor,
Matheson Radio Company, Inc.
GEO. O. SUTTON,
Counsel for Intervenor,
Berks Broadcasting Company.

No. 585, October Term, 1942

Order allowing certiorari

(Filed January 18, 1943)

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

221 In Supreme Court of the United States

October Term, 1942

No. 585

Stipulation in re record on writ of certiorari

(Filed Jan. 27, 1943)

It is hereby stipulated and agreed by and between the attorneys for the above-named parties that the transcript of record filed in this Court with the petition for certiorari may be used in the hearing of this case on the merits and that no additional matter need be printed.

It is further stipulated and agreed that either party may refer in the briefs or oral argument to any portions of the certified transcript of record which are not included in the printed record to be filed in accordance with this stipulation.

CHARLES FAHY,
Charles Fahy,
Solicitor General,
Counsel for Petitioner,
Federal Communications Commission.

PHILIP J. HENNESSEY, Jr.,
Philip J. Hennessey, Jr.,
Counsel for Respondent,
National Broadcasting Company, Inc.

GEO. B. PORTER,
George B. Porter,
Counsel for Matheson
Radio Company, Inc.

GEO. O. SUTTON,
George O. Sutton,
Counsel for Berks
Broadcasting Company.

JANUARY 27, 1943.

[Endorsement on cover:] File No. 47086. U. S. Court of Appeals, District of Columbia. Term No. 585. Federal Communications Commission, Petitioner vs. National Broadcasting Company, Inc. (KOA), Matheson Radio Company, Inc., and Berks Broadcasting Company, Intervenors. Petition for a writ of certiorari and exhibit thereto. Filed December 12, 1942. Term No. 585 O. T. 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1943